Roome, Tapping

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C. Hunt

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Municipal Law

May 26th 1873

Law in its most genl & extensive sense is
=nifies a Rule of action

Municipal Law is difined to be a Rule
of Civil Conduct prescribed by the supreme
Power of the State commanding what is
right & Prohibiting what is wrong

6 I B.C. 44. 122-

To follow the definition it is a Rule. bec
=ause it is permanent & universal & uni
=form - It must be universal or it will
not be within the definition, that it m
ust be genl throughout the State when
it operates & not Personal nor confined
to particular Places

It is a Rule of Civil Conduct as disting
uished from Natural Law or moral Con
duct

6 I B.C. 45-

It must be "Prescribed" by the word being
prescribed is meant that it is made & pro
=mulgated before it goes into effect & thus
it differs from Retroactive Law - this
is clearly a difference between Retroactive

Supt
S. W. Code
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& Ex post facto Law altho they are frequently confounded. the former is a genus of which the latter is but a Species — an Ex post facto is a Penal Law merely — A Retroactive Law is any Law that operates in a Retro=active manner — Hence an Ex post facto Law does not signify a Retroactive Law — But a Retroactive Law may signify an Ex post facto Law & Dallas Rep. 386 — No other than a Penal Law can come within the definition of an Ex post facto Law

Municipal Law is a Rule of Civil Conduct prescribed by the Supreme Power in a State — The Legislature is the Supreme Power in a State & one deputed to make Laws — which is the greatest act of authority one being can exercise over another

& 1 B.C. 46-90 —

To interpret & discover the will of the Legislature as expressed in the Laws it is necessary to make use of Signs the most natural & Probable & those signs consi=st

Context, subject matter, effect, & consequences or in the Spirit & Reason of the Law

And first words are generally to be understood according to their most known, common & proper sense not so much Regarding the propriety of the grammar as their popular meaning

Words of art & technical Terms are to be taken according to the acceptation of the learned in each art, trade & Science. but it is a Rule that a word having a known signification at Com. Law is used in a Stat, Recourse must be had to the Com. Law to discover the meaning of that Law 1 Bac 59. 60- 6 Mod 163. 164- Vin 513- 4. Bac (544 (45)-

2dly if words are dubious their meaning may be discovered from the Context & for the same Reason their Preamble or preamble may be Consulted with singular advantage ——— So when ever Statutes are made in Pari materia or on the same subject they may be Construed with Reference to each other (ie) what is Clear in

one Stat shall be called in aid to explain what is obscure & ambiguous in another
4 Bac 645 - 1 Ves 365. Plow 206. L^d Ray 1028 -
3^d The words of the Law are always to be understood as having Reference to the subject matter 6 Bl L - 60 -
4^th The effect & Consequences of the Law are to be considered in the Construction of it - thus when the words bear litterally an absurd meaning the Received sense of them must be a little deviated from
6 Mod 344 - 4 Bac. 552 - 10 Bl. 61 -
5^th But the great & last Rule is that when the words are dubious the Reason & Spirit of the L is to be consulted & observed & Blackstone himself observes that when this Reason ceases the Law itself ought to cease with it
By interpreting the Laws from the Reason of them arises what is called Equity which is defined by Grotius to be "the correction of that wherein the Law by Reason of its universality is deficient"

By an Equitable Construction of the Law is not meant what the term would seem to imply - but a Reasonable Construction - see division of Municipal Law -

{Law 232 - 1. Bl. C. 61 - Inst 24 -
{3. Bl. C. 241 - 19 Vinn 514. 521 - C

Municipal Law is divided into the Lex non Scripta or unwritten Law & the Lex Scripta or written Law —

And first of the unwritten Law
This includes yent Customs or the Com. Law properly so called - the particular Customs of Certain Parts of the Realm & those particular Laws that are by Custom observed only in Certain Courts & Jurisdictions

{1 Bl. C. 63. 7 —

The Lex non Scripta is so called because its original institution was not set down in writing & Receives its Power & force from long & immemorial usage

{1 Bl. C. 54 - 7 —

The Com. Law derives its appellation of Com from its being Common to the whole Common
= unity

& is therefore a Gen.l Rule Custom -

& 1 B.C. 63-8

It claims for its authority upon universal usage & to be binding it must have existed "time whereof the memory of man runneth not to the contrary" according to the Legal Phrase & this time has been long since fixed at the Commencement of the Reign of Richard I in the 12th Century

& 1 B.C. 68. 2 Inst 236-7 -

But as the original institution of the Com Law is not set down in writing - it may perhaps be enquired where it is to be found It is not to be understood that these Laws are at present merely oral or communicated from Generation to generation by word of mouth - But the monuments of it are contained in the Records of the Several Courts of Law & Justice - Yet this is not the Law itself - ~~but~~ for if it was it would instantly cease to be unwritten - But it is primâ facie evidence of what the Law is & 1 B.C. 63. 9 -

& 71 -

The Com. Laws & their maxims are known & their validity determined by the Judges of the several Courts of Justice who are the expositors & living oracles of the Law

Their Judicial decisions are the authoritative evidence of the existence of a Custom & forms a part of the Com. Law

A Precedent is a former Judicial decision of the point in question & nothing short of a Judicial decision can be considered as a precedent. The mere opinion of Judges on the Bench however solemnly given are not precedents But prima facie evidence of the Law — And the Rule is that former precedents are to be observed & followed unless plainly absurd & unjust then precedents are not to be overruled because the Reason of the Law cannot be given the absurdity must always be shown by him who would evade the authority

1. Ca. 49 — 1 Blac Com 69-70 —

The System of the Common Law was built by the Judicial decisions in the Cou

=rts

of Justice & is a Complete system of Ethics

If the Com. Law was created by the Courts of Justice it would seem there was a defect in the definition. for the Judiciary are not the Supreme Power in a State

But when this Law is acquiesced in by the Legislature it may be said to be sanctioned by the supreme Power of the State

The new decision not being the Law but merely evidence of what the Law has been time immemorial altho that before. such Law was never heard of yet by fiction it is supposed long to have existed. Some certain branches of the Com Law have been established. long since by fiction it has been created

2d the second Branch of the Lex non Scripta are the particular Customs or Laws which affect only the Inhabitants of particular districts the difference between this & the first division of the unwritten Law is explained by the terms —

If it is a local Custom or usage pre-
=vailed

so long that its original cannot be traced which Custom has been generally confirmed by Acts of Parliament - This Custom must be specially Pleaded & the existence of the Custom shewn as a matter of fact & when this is done it must appear that the case in question comes within the Custom 1 Bl. 76 - Litt Tent 125 - Co Litt 175 - 271 -

As a particular Custom must be Pleaded so it must be tried like a matter of fact And when it is once Recorded the Court are bound Judicially to know that such a Custom exists & it Precludes the necessity of proving it - 1. Bl. 76 -

Blackstone in his Commentaries (1 Vol. 75) Classes the Mercantile Law among particular Customs - But this is erroneous for it is not confined to any local limits any more than the Com Law - It need not like a Particular Custom be specially Pleaded A Particular custom can only be tried by a Jury But the Law Merchant is decided by the Court & is not like particular Customs to be proved

by witness altho in doubtful cases they may be introduced to inform the Judges - hence it must be considered a Branch of the Com- Law { Lo. Ray 175 - 3 B.C. 436. 2 do. 459 - 455 - 7 (= 109 - 4 Tu Rep 208 - 2 Bac 1218. 22 - 10 Bro Rep 298 Chit 13. 28:

As to the qualities of Custom — A good Custom in the first Place must be immemorial 2nd It must have been continued uninterrupted 3d It must be Reasonable or Rather it must not be unreasonable - 4th it must be as is termed Pleaible (ie) acquiesced in 5th It must be certain intelligible and not vague - 6th It must be Compulsory & not optional 7th & lastly all Customs must be consistent with each other for if they are all inforced it will be a Legal So =lecism { 1 B.C. 76 - 8 - 9. Co. 18. Inst. 183 - 4 -

In the Customs which are in derogation of the Com. Law they are to be construed strictly — { 1 B.C. 78. 9 — In Eng. all Customs bend to the Kings Prerogative { 2 Inst. 15. 1 B.C. 79.

3d The third branch of unwritten Law are those Parliamentary Laws which are adopted

by Custom & are admitted only in Certain Courts & Jurisdictions By them are understood the Civil & Canon Laws – 1 Bl. 64. 79

These Laws are binding in Eng. by adoption & not on account of any Inherent Authority 1 Bl. 79. 80 –

And in the Same manner the Com. & Stat. Law of England as far as they are binding derive their Authority from a Similar Sanction (ie) by usage & adoption Altho in some States they are made so by Statute — It is Clear that our Courts ought not to Reject the Com. Law unless it is either unjust, absurd or inapplicable And it is prima facie evidence of the Com. Law by reason of its having been adopted & Recognized by our Courts

It has been made a question whether the Com. Law can exist in this Country distinct from that of England

And yet so far as the Law of Eng. is applicable to our Law so far we must have a Com. Law of our own the objection was

there could not exist a Law whereof the memory of Man runeth not to the contrary - And this is the definition of the English Com Law - but Legal memory is one of those Rules that cannot exist in this Country. for at the time of Richard I^st this Government was not established neither was the Country Known. so that if we have a Com. Law of our own we must discard the arbitrary Rule of the Eng. Law that a Custom must have existed from the time of Rich^d I

Every Country must have a Com. Law of its own or Civil Society must cease and it is Equally true that there must be an unwritten Law or there could be no administration of Justice - Prior to the Reign of Rich^d I. Sixty years were sufficient a Condition, And by the same Rule we may have a Com. Law if a longer period is not necessary

The Lex Scripta or written Law is next to be considered — By the written Law is meant the Statute Law — 1 D.C. 88, 8. Co. 20 — The antient English Statutes are said to be binding in this Country as far as the Com Law & are prima facie evidence of our Law And the reason is our Ancestors on their emigration into this Country Brought with them so much of the English Law as then existed as their birthright & they were at Liberty to consider themselves bound by it as far as they pleased But 'tis not so with Respect to the Statutes enacted since the Colonization of the States ceased — What in point of fact is the modern Eng. & Com. Law is not in point of fact is the ancient Com. Law for the theory of the ancient English Com Law is that it has existed time immemorial { 1 Salk 411. 666 — 1 Bl 106 — 8 Pow. dev. 52 2 P. Wms 75 — Kir 369 — 1 Jac. & Wal 380 —

But our Courts have considered themselves at Liberty to adopt as many of the ancient Statutes as they pleased in the same manner

as the Com. Law is adopted & those that are in applicable are of Course Rejected & in addi all actions on the Case were unknown to the Com. Law & were never until Still granted & Regulated by Stat Westr. 2nd —
Neither were Costs ever allowed 'till the Stat of Gloucester & marks how it appears that what in Engd is written Law has by the manner of its operation here become the unwritten or Com. Law of this Country
All Stats are either genl or Special or as they are more Commonly Called Public & private — 1 B.C. 85 —
A public Stat Regards the whole Community — A Private Stat. particular Persons or things — This is not by any means an obvious definition but it is on the Contrary very imperfect for in many Cases Stats that Relate to particular Classes of Persons are Public — And it is said that if the Clause to which such Stat Relates amounts to a grievance it is a Public Stat — if it

amounts to a Statute only it is a private Stat. Thus if a Stat is made relating to all mechanics - it is a Public Stat for there are many Kinds of Mechanics But if a Stat is made Relating to one Kind of Mechanics only as Blacksmiths or Shoemakers it is a Private Stat for they admit of subordinate division - and the Rule is that if the Class to whom the Stat. Relates admit of a subdivision the Stat is Public. But if it cannot be divided except into Individuals it is Private 4. Co. 76. a. 2 B. 19 Vin Abr. 496 - L. Ray 120. 381. 1. B. 486

Every Stat in Eng. that Regards the King is a Public Stat - Thus a Stat giving a forfeiture to the King the coming from a particular Class is Public so every Stat concerning the Public Revenue is of course a Public Stat - 10 Co. 57 - 4 Bac. 649. Plow 65 12. Mod. 249. 613. -

Stats are again divided into such as are declaratory of the Com. Law & such as are Remedial of some defects therein

They are said to be declaratory when they promulge what the Com. Law is or in other words what it always has been
They are Remedial when they supply some defects or abridge some superfluity in the Com. Law which has arisen from change of time, circumstances or from the gen[l] imperfection of all human Law or from any other cause whatever — 1. Blac 86 —
Again all Stat[s] are either Remedial or Penal or as they are more properly termed in Law Beneficial — Remedial being here used as Contradistinguished from Penal, in the former division as Contradistinguished from declaratory —
A Stat in inflicting a Penalty or Punishment is Penal — the word Penalty as here used being synonomous with punishment — Altho in its Gen[l] acceptation it signifies no more than a mulct levt in the Eye of the Law a forfeiture of any kind of estate & is in fact a Punish-

{4 Bac. 450. Cro Jac. 414. 6}

(-ment

There are Statutes which operate as penal but are not so Regarded - such are those which give a higher Penalty than Justice requires, as for instance those which give double & treble damages in Civil Cases { Salk. 212. 10 Mod 225. Cro Jac. 414 -

All Statutes therefore that are not Penal or do not inflict a Penalty are beneficial 1 Will 126 - 3. Co. 4. 7 In Roberts 259 -

Statutes giving Costs are always allowed to be Penal. It has before been Remarked that Costs were entirely unknown to the Com Law - they were first introduced by the Statute of Gloucester { 6. Edw -

and considered a Punishment upon the Party who Paid But Mr Gould Suppose they were Rather as an indemnification to the Party who Rec^d them - { Salk. 205. 1 Bac 207 & 14 - Raym 367. Carth 119. 122 - 4 Mod 6. 7 -

Statutes are lastly divided into affirmative or negative. the former are couched in affirmative terms. the latter in negative - this distinction would appe

=ar

very unmeaning were not the Construction of them very different

1. Blac. 89. - 4 Bac. 640 -

Every Statt in Eng. Commences its Operation from the first day of the Sessions of the Session at which it is enacted unless a particular day is named -
Hence it would appear that these Statutes have a Retroactive Operation

Mob. 111. 222. 309 L^d Ray. 371

By fiction of Law the Sessions of Parliament are considered as consisting of but one day & hence after affirmative Statt. being enacted during the same Session neither have priority, & if they are in consistent or Repugnant to each other each Repeals the other - 4. Bac. 636. 19 Vin. 521

This Rule of the English Law is followed in Conn^t & the Rule usually laid down is that no Statt shall have effect until the close of the Session & then Representatives shall have had sufficient time to Return home & their Constituents be informed of the Law -

Of the Construction of Statute Laws

The object of all Rules for the Construction of Stat. Laws is to ascertain the will of the Law Makers — In the Construction of all Stat: that are not Penal three points are to be considered (viz) the old Law, the mischief & the Remedy (ii) what the old Law was at the time of making the act, what the mischief was for which the Law did not Provide & what remedy the Legislature hath provided to cure the mischief — The particular Rule for the Construction of Stat: & which are always to be observed have already been given (ii) for the Construction of Remedial Stat: — but Penal Stat: are to be construed Strictly & according to the very Letter of them {1. D. 6. 68. 8. Co. 7. 8 Leav. 104 —

But this Rule is not well adhered to it operates on one side only — for they are always to be construed in favor of the prisoner & never against him — he is never to be Brought within the Stat: unless he be

within the letter of the Law he shall not be subjected altho he be within the Spirit of it. & if within the Spirit he shall not be subjected unless within the Letter This Rule seems to be founded altogether (within) upon the benignity of the Law. But modern decisions have liberalized the Rule that Penal Statu must be construed strictly against the Prisoner & liberally for him — 1. How 53. 61. 116. 131. 138 How 17 Law Cro Car 70. 1. 104. 191. 233. 300. 387

Any universality in Penal Statutes does not extend to those Persons who in Similar Statutes are excepted — How 465 —

Again if the Substitution of an Offence in curs an increased Punishment the Offender is not subjected to it unless he has been Convicted of the first — 4 Bac 1-1-1 1 How 168 - 1 Hal 3 (2) 24 - 170 - 685 - 1. Root 52 - 168 —

It has been observed that the Construction of Statutes have been in favor of the Prisoner. but this is a gen: Rule & has not been universally adhered to, as

as where by the Stat Ed 3d the killing ones master is declared to be Petit Treason & this was held to apply to killing ones mistress when the Servant had no Master — Now it is clear that the offender in this Case is without the letter of the Stat. Yet he is brought within it by Construction & Cro. Car 71. Row. 86 —

But the true Rule is that the intention of the Legislature when discovered ought to be Carried into effect - as well in Penal as in Remedial Statu & of late Courts seem to have been guided by this Rule more than formerly for it is a mere evasion of the Law to Carry a Person without the letter of the Stat when he is Clearly within the Spirit of it & 4 Ins Rep 3 — The penal Laws of one sovereign State Can not be taken notice of in another, so as to effect the rights of a Citizen or denizen residing in the latter & 3 Ins Rep 733. Kirb 76. 80. 1 Hen Blacs 123

But the Penal Laws of a Country extend throughout the Judicial limits of that Country & of Course to every Person within those limits — Kirb 38 - 79. 88 —

All Stats of Limitation are within this description & 10 Mod 282 —

The words of an explanatory Stat are not to be extended by Construction but are to be taken in their strict sense

& Coutt 396 - Lak 53. 4 —

Stats that are partly penal & partly remedial are to be Construed Strictly in part and ~~penal~~ liberally in part - Strictly as it respects the penal Part & liberally as it Respects the Remedial part - part & 1 B.C. 88. 3. Co 82. Plow 57 —

It is a Rule applicable to all Stats in Gen^l that the different parts of the same Stat are to be so Construed that the whole may stand together & any saving, Exception or Proviso that is totally Repugnant to the body of the Stat it is void & 1. Co. 47 - 1. B.C. 89 —

Every Stat is from its nature Repealable & this is one of the first principles of Law for if it were otherwise there would be no Sovreign Power, From the very nature of the Law making Power - the Law maker has a Right to abrogate all Laws *

* Read this for the next Page ——

When a Penalty is Repeatedly incurred in one offence - But one Penalty can be sued for and Recovered at a time - as in case of a Nuisance - And even when it is provided for by Statute that every Months or every week's continuance of a Nuisance shall subject the offender to a Stipulated forfeiture if a greater lenght of time has been suffered to elapse a Recovery can be had for the last month or week only -

Remedial & benificial Statutes are to be construed liberally or Equitably - they are not to be construed according to the Letter unless the letter accords with the intention of the Lawmaker - Cases not within the Letter of the Law may be brought within it & where within it may be taken out 6 Dyer 364 Pow Dev 141 -

But Stile Statutes are in Gen.l to be liberally Construed - yet there are exceptions - for a Statute taking away a Com. Law Remedy & of course abridging the Right of a Citizen it is to be Construed Strictly *

* This Page is to be Read for the preceding one so vice versa

So that when there is a Clause in a Stat "that it shall never be repealed" it is absolutely void, for such a Clause is in derogation of the Authority & Power of all subsequent Legislatures. 4 Bac 638. 1. B.C. 90 —

Tho all Stats are Repealable, yet the Law does not favor a Repeal by implication for Repeal always grows out of a Repugnancy — 11 Co. 67. 10 Mod 118 —

It is said that affirmative Stat, do not abrogate the Com. Law — But Mr Gould conceives that Rule amounts to nothing at all or is Certainly false for if there is a Rule of Com. Law that Notice in Case of Civil Proceedings shall be 6 days & a Stat enacts that it shall be 12 days. the Stat is affirmative but without doubt the Com. Law is abrogated & the Rule if Case is into effect would be Ridiculous Inst 111 do 115 — 4 Bac 641. 10 Mod 237. 4 Bac 2020 —

Affirmative Stats however sometimes give what is Called an accumulative Remedy In this Case the Stat does not abrogate

the Com. Law but is considered to be concurr
=ent withit - - 2 Bac. 803. 5th

Again it is laid down that an affirmati
ve Stat does not Repeal an affirmative
Stat - But W. Q. thinks this Rule as abov
ed as the former - the truth certainly is
that when an affirmative Stat if it inhibits
a Negative or when Repugnant to the form
er or that is affirmative it will Repeal
it 2 Show 30. 1 B. 6 89 -

The Rules do not apply to affirmative
Stats when there is an express Repealin
g Clause - If a Stat inflicts a high
er or lower Penalty than a former the
former is virtually Repealed

{ 4 Bac 202 - 6 Leuit 212 = 4 Bac 684

But when the Penalty is higher at Com. Law
the Com Law is not abrogated but is conc
urrent with the Stat -

But when the Penalty is lower the Com. Law is
Repealed { Leuit 262 - 4 Bac. 264

Whenever a Repealing Stat is itself Repe
aled the Stat first Repealed is Revived. 1 B. 6.

(90

If a Stat is Repealed by 3. Repealing Stats & two of them are Repealed the Stat that remains Remains in full force & 4. Bac. 638

It is a Rule that when a Stat is Repealed that all acts done under it are valid and Justifiable - But 'tis said in the English Books that when a Stat is declared Null it is otherwise - Yet this Rule seems Contrary to the first Principles of Punishment - Neither is it authorized by modern Authorities

& Ins 233 - 4 Bac 638 -

When a Stat is expressly Repealed by which is limited in its duration the Stat so Repealed is not Revived on the expiration of the Repealing Stat & 3 East 205 -

If the Stat after having been violated & him before the Conviction of the Offender & a new Stat is made upon the same subject he can be punished under neither not under the old Law because that is no Law in existence which authorizes the Sentence that must be given -

Not unless the new Stat becomes that would be giving a Retroactive operation — This Law not being in force at the time the offence was Committed 1. Hawk. 159 +

{1. Blac Rep. 451 - 1. Root 59 -

This doctrine has been Recog^d in the Courts of the United States in the Case of Fenwell

——— If one Covenants to do a thing which was Lawful, But before its performance it becomes unlawful — by Stat the Covenant is annulled 1. Salk. 198. 2 Roll Rep 314 321 - 135 - 2 Bl. W. 218. 8 Tau Rep 264 —

If one Covenant not to do an act which it is after wards made his duty to do such Covenant is made in like manner annulled {1 Salk 298 —

But when one Covenants not to do an act and a Stat is afterwards enacted which makes it Lawful the Covenant is not annulled - for in this Case the Stat merely permits but does not Require the act to be done {1 Salk 198 —

If a Contract declared to be illegal by

State is made while the State is in force a Subsequent Refusal of that State does not make the Contract binding - for nothing can make that good which is void ab initio {1 Hen Blac 65

But when the complete performance of a Contract is made illegal - by a Subsequent State - Still if it can be performed in part a Court of Chancery will Compell it {1 Lonth 209. 211 - 2 Hen Blac 163 (81) 178

2 Pr. Pail. Cas 389. 1 Tu Rep 254 - 2 Pow. Con 448 on 518

The Constitution of the U States prohibits the enacting of all Ex post facto Laws & Laws impairing the obligation of Contracts

{ Const. Art 1. 10 Sec -

all State Requiring the performance of that which is impossible are of no validity {1 B & 91 -

And it is said that all Contracts Contrary to the dictates of Reason or the Laws of God are also void {5. Co 118. 1 Ld 84. 9. 1 Lont

{ 10 Rep. 41 - 91 -

But Legislative acts in opposition to fun-

= damental

Law or the Constitution are ipso facto void
§ Legislative usurpations, View the Federalist
(Page 393 Note 2—

When Stat enables a Court to do a matter
of Justice to a party - the Court are bound to
do it § Str. 1131 - 5 Tu Rep 538 - 2. How. 263. 374—

If a Stat make a new Law concerning
an old affair or offence & appoint Certain
pertinular Juages to determine upon it the
old Court is not excluded from its Jurisdi
ction & the Law is the same as it Respects
all Cases of a Particular Kind of offence
for a Court shall never be ousted of its Ju
risdiction by implication § 1. How 114. 9. Co. 118
§ Salk 564 - 2 Bur 1042

But if a Stat Creating a new offence at
the same time Creates a new Court for tri
al the Jurisdiction of other Courts is exc
luded § Cow 524 - 1 How. 9. 2 do 302. 2 Mod 5 6 Cow 543.

When a Stat enables Certain persons to
do Certain acts by the vote of a Majority &
constitutes a Certain number a quorum
It has been questioned whether a vote of

of a Majority of the quorum can bind the whole - the better opinion seems to be that it cannot - {10 Co. 30. Hob 211 - 3 Lev 514 - 4 Lev Rep 810. 822 -

A private authority confined by Statute to two or more Persons is joint & not several unless otherwise expressed - But it is said that if Power of a Public nature is given to several, the act of a Majority is the execution of their Power & is binding if all are present, but the Rule Requires the Presence of the whole {Bro & Rule 229 - 2 Burr 1079. 3 Lev Reports 192 -

But these Rules do not Restrict Corporations for these the Majority of those present are capable of acting for the whole unless it is otherwise expressed in the act of incorporation {2 Atk. 212. 1 Bro & Rule 236

The word void is frequently confounded with the word voidable in Statute & this altho there is a wide difference in their significations - A void act is one that is considered never to have existed & does not allow it

of Conjunction but Avoidable act may be ratified & stands good until it is Renounced & Nullity by the party

The Rule as to Construing such Stats is this if the objet of the Legislature would be defeated by Construing it Litterally a different Construction must be put upon it as the 14th Geo. 3d which enacts that the deeds to which it Refers shall be absolutely null & void to all intents & purposes — Yet the Courts have Construed them only voidable at the Election of the party Concerned 1 Inst 45. 3 Co. 60 - Cro Eliz 207. 1 Bl. 84 2 Ter Rep. 206. 7 mo 310 -

The Rules for Construction of Stats is the same in Equity as at Com Law & hence a Construction given in our Courts is a good precedent in the other - Yet the mode of enforcing the Law may be very different 3d Bl. 430-38 - 1 Forth 82 Doug. 262 -

Of Pleading Statutes & the Mode of proceeding upon them

To Plead a Stat is merely to State the bare facts

& bringing the Case in question within it
as to Pleading the Stat of Limitation in an
action of Assumpsit. The Deft is only to
State that he did not assume & promise
in fra sex annos (3 L Ray 11. 221 –
Counting upon a Stat consists in an express
Reference to it in the Pleadings as by the wo
rds "by virtue of the Stat in such Case mad
e & provided &c — as the Case may be –
Reciting a Stat as here implied is to quote
its Contents verbatim
These terms to wit Pleading a Stat. Cou
nting upon a Stat. & Reciting ~~when~~ a Stat
have been always confounded in the book
& the distinction never well taken. They
as it appears three entire different things
altho writers have been in the habit of us
ing one for the other. by which the meanin
g of the other has become totally obscured
It is a general Rule that Judges are bound
ex officio to take notice of Public Stat, &
of Course there is no need of informing the
Courts what the Stats are – or of Counting

upon them — But of private Stats the Iuedges
com take no notice unless Specially Pleaded
and set forth - 4 Co-76-10 do 57 Cro. Eliz 236. 1 Ban 38
The Reason is that Public Stats are a part
of the gen^l Law of the Land — But Priva
te Stats Relate to private Concerns only
and the Rule as it Relates them is as it
is Respecting private Contracts & for this
Reason that they must be Specially Pla
ded — But in Connt it is enacted that
a Deft may give a private Stat. in evidence
as under the gen^l Issue without Pleading it
at all (see Stats of Connt) But when ever
he Relies upon a private Stat. he must
Plead it as he would a private document
In Connt if an action is Brought upon
a Private Stat the Party must set it out
as a Specialty — As Public Stat when Requi
red to be Pleaded or Counted upon need not be
Recited the Proper office of Pleading, is to
State the facts - 4 Co. 76 10 do. 57. 1 Ban 38—
It has been said that altho it is not nec
essary to Recite a Stat. yet a Misrecital

of it will be fatal & Cro Eliz 245 or 55 - Cro Car 376 - 136 - 522 - Cow 474 - 4 Bac 658 -

But Mr Gould imagines that the same Rule would hold him as in the Recital of an Instrument alledged to have been forged in an Indictment (ie) if the Mistake is in an immaterial part as by the omission of a Letter or the like it will not fail But the Rule given by La. Holt seems to be the true one which is that the misrecital of a Public Stat will not be fatal unless the Party ties himself down to it by the words "&c" agt the form of the Stat &c" or words of like import & the Jurors will take notice of the true Stat Ex officio

6 L Ray 382 - 2 Mo Not. 506 -

The Misrecital of a Private Stat is cured by verdict & is not ill on demurrer - but the opposite Party who wishes to take advantage of such Error must Plead Nul tiel Record or pray over of the Stat & Recite it himself upon the Record by which the misrecital will appear - here a Private Stat is treated

privately like a Bond & 2 Ld Raym 382. 2 Mod 241.
1 Lyn 396. 2 Mk Nal. 517.

It is a genl Rule that a Publik Stat need not
be Pleaded But this does not universally
hold for there are a great number of Cases
in which it is necessary that the Stat sho
uld be Pleaded as when a Publik Stat is
to be used to defeat a Speciality - as in an
action on a bond given for a gambling Consider
ation - the Stat Prohibiting Gambling must
not be Pleaded & the Reason is that if the
Stat is given in evidence the Issue will
not be supported 5 Co. 69. b. 119. a. Hob 99.
3 Salk 391.

But where one founds his Claim upon a pu
blik Stat he must Plead it - yet in declari
ng upon a Publik Stat it is unnecessary to
Recite altho if it is done it is not fatal
But Rather inconvenient & inexpedient
for it exposes a Party to a misrecital
on the other hand he who declares upon a priv
ate Stat must Recite it - a Literal Recital
is not Required a Substantial one is sufficient
4 Co. 76. 2 Mod - 57. Hob 227

It is always needless to Recite the title or preamble to a Stat altho it is frequently done
The Reason is that neither the one nor the other a Common any part of Law — The former being but the name by which the Stat may be distinguished & the latter being merely explanatory of the motive by which the Legislature were actuated in making the Law. 3 Co 33 - 4 Bac 685-8.
As it is not necessary to Recite the title or preamble of a Stat it has been Holden that the mistake of either is not fatal. but the latter decisions are to the Contrary
{ L^d Ray 77 - Hard 324 - 6 - Mod 62 —
Whenever it is necessary to Recite a Stat the party must give its date & Reign when enacted — the same as of a Bond otherwise it will be ill on Demurrer — {4 Bac 61-7-
Cro Jac 211 - Cro Car 232 - Cow 274
When a Private Stat is pleaded in a Suit the opposite Party must Plead Nul tiel Record for it is a mere matter of fact & not a part of the gen^l Law — But Nul tiel Rec-
-ord

cannot be Pleaded to a Public Stat. because it cannot be tried as a matter of fact, 4 Co 76 8 do 28. Cro Car 335 - 2 Mod 54 -

In declaring upon Public Stats it is necessary as before observed to Recite them - but tis not necessary to Count upon them 6 19 Vin 503 - 1 Bac 38. Cro Eliz 601. Carth 382 -

But to this Gent Rule there are some Exceptions as if a party has a Remedy at Com. Law and a Remedy by Stat also if he founds his Claim upon the latter he must Count upon it for otherwise it will not be known which Remedy he means to pursue & it will be presumed upon the Com Law

Contra 4 Bac 18, 1. Com. 330. Leline 584

Another exception to the gent Rule is Penal Stats which must always be counted upon 2 Hawk 536-7-217 - Plow 206. Yelv 32. 1 Bac. 38. 4 Le Rep 521. 2 Cart. 393

The second & last Exception is when a Publ ic Stat gives a new form of action the Stat must be counted upon as in the action of

of wrote which is known only by the Com Law for the Recovery of damages - But in an action under the Stat to Recover the Loss in qno The Stat must be counted upon - { 4 Dan 656 - 19 Vin 504

It is laid down in East that the Stat in this case must be recited - But when a Stat extends a Com. Law Remedy to a new case - him it will not be necessary to Count upon the Stat - { 1 Com 230 - 19 Vin 503 - 4 - 2 Bac 43 Dyn 38 b - 85 a. 2 6 -

In an action upon a Municipal Stat it is not in gen necessary to Count upon it

When the Stat creates an offence but gives no remedy - the Com. Law will provide one & it will be unnecessary in such case to Count upon the Stat.

{ Car 382. Salk 212 -

It has already been observed that in penal Prosecutions the Stat must be Counted upon so when one Stat prohibits an act & the Remedy is prescribed by an other Stat must be Counted upon - Plow 206. 2 Cart 333 - 4 Bac 46 56

When the Com. & Stat Law give two Remedies

But it must be done in two distinct Counts & this for the same Reason that two similar offences may be joined in the same instrument & Lead 235-

If a Temporary Law having expired & is then continued by a Subsequent the former is to be Counted upon if either - & 2 Stra 1066-

The manner of Counting upon a Stat is by the words "Contra formam Statuti" &c - If these words are insisted in an indictment when the punishment is at Com. Law only the indictment is good altho the words will be Surplusage & 1 Ld Rch 152-8 Co 302

If an unwritten Contract is good at Com Law & is Required to be in writing by Stat it need not be Stated to be in writing it is sufficient that it appear so in evidence & 12 Mod 540. Bull N. P. 279-3 Burr 1790 - 2 Ld Ray 1150-Cro 289-10 Coke 77-8-

But if it be essential to the validity of a Contract at Com. Law that it be in writing it must appear in the Pleadings to be so alledged 2 Wills 376. Esp. Dig. 261-304-8-Cro Ca 279-383-

But when a Stat makes it necessary to the validity of a Contract that it be in writing the Contract being unknown to the Com Law it must be alledged to be in writing as in Case of a devise & 12 Mod 340. 4 Ben 656. Salk 172

In Pleading to Stat there is a very important distinction to be observed when there is an exception in the Enacting Clause of the Stat it must be negated in the declaration or Indictment - but if the exception is a Substantive Clause it need not be negatived. the Reason is that the former goes to the discription of the offence while the latter is new matter of defence for the other party - 1 Sa Rep 141. 1 Bac 153 - 1 Sa Rep 83, 1 Sid 59. D:

But when there are two subsisting remedies one at the Com Law & one by the Stat either may be pursued for the remedy is — Cow 648 — 2 Haw 302 Lewd 335 - 2 Bur 739 - Salk 45 -

And hence if the Pff pursues his action upon the Stat & cannot support his Complaint it he may resort to Com Law & Recover in the same suit & this Rule applies as well to Criminal as Civil Cases & 2 Bis Rep 900 - 2 Mc Nel 493 - 1 Haw 211 - 2 do. 302. 316. - Salk 212 - 1 Sa Rep 109 - Contra Cro E. 304. 699 - 231 - 1 Co 99 - 3 If that which is no offence at Com Law is made so by Stat & a particular mode of prosecution is pointed out no other can be be pursued - E Cro Jac 644. Salk 45

& 7 Co 36. a. 2 Bur 80 - 1 - 4 do 2333

But this Rule Requires qualifications & is not
holds but in two Cases 1 when the particular
mode of Prosecution is pointed out in the
Prohibitory or enacting Clause but the pro
vision is made Separately in all other Cas
es the Rule does not hold & 1 Burr 544. 2 Haw
302 in Note - 4 Inst Rep 205
But if that which is prohibited by Stat was
before Punished at Com Law the Com Law
may Still be pursued - the Stat. prescribes in
other form of Prosecution & the Reason seems
to be that the Statutory mode of Prosecution
is not to be favored by Implication
& 2 Burr 805-834 - 4 Inst Rep 202. 2 Hawk 302 -
If a Stat Creates an Offence but gives no rem
edy the Com Law will lend its aid & furnish
a Remedy - As when a Law is enacted pro
hibiting a Person from erecting a building
upon his Land so as to obstruct the light of
his neighbour - This is done & there is no Re
medy provided by Stat. - But the Com Law
will furnish a Remedy adapted to the Case
as an action on the Case for a Nuisance

1 Bur 544 - 19 Vin 512 - 18. 3 Lev 290 - Doug 425 - 10 Cro 4 -
6 Mod 266 4 Bac 613 -

The violation of a mere prohibitory Law is considered as a misdemeanor only and punishable as such - To obstruct the execution of Powers granted by State is an offence at Com. Law { Doug. 425 -

Who may Prosecute upon Penal Statutes -
No Public offence can ever be prosecuted by an individual in his own Right & Capacity
The Public is the party injured the Action belongs to the Public only -
In Eng. in all public prosecutions the King is the prosecutor & him the State
{ 1. Haw 268 - 4 Bac. 2 -
Yet a State may enable any individual to Prosecute for a Public - but the King is always to be joined Leach Cr Cas. 229 - 242 - 2 Str 260 192 - 198 - 2 Str Rep 44 - 190 - 198 - 205 -
And private prosecutions are allowed in Eng. even in the Case of felony -

A qui tam Action is one that is Brought partly at the suit of the King & partly at

at the Suit of the prosecutor - and of the Penal
ty which is Recovered on the Conviction of the
Offender part goes to the King & part to the informer
{2 Haw 264 - 1 Bac 37 - 3 Bl Com 182 - 4 Co 308
Then is a distinction to be taken between qui
tam Actions & Qui tam informations the
former are prosecutions by writ - the latter by
Criminal Proup {3 Bl. 161 - 2 - 4 Bl. 308 -
In this State qui tam Complaints are in
the Nature of informations -
Qui tam Prosecutions are almost always
founded on Penal Statu & are considered as
the mere Creation of the Penal Law & it
is said that are entirely unknown to the Com
Law { 1 Bac 37 - Cro E 877 - Cro Jac 360 -
All qui tam actions are popular bcau
se they are given to the people in gen-
eral it does not necessarily follow that
all popular actions are qui tam &
the distinction seems to be that if part
of the penalty goes to the King on Convi
ction of the Offender the King must be jo
ined in the action & it is then qui tam

But if the whole forfeiture accrues to the prosecutor the action is then called Poena Cor & the King is to be Joined or not as the Case may be {3 Bac. 161-2-2 Co 437-

It has already been observed that when a prohibitory Stat gives no Remedy the Com Law will furnish one And it appears to be a gen^l Rule that when a Stat for the advantage of the Subject gives no remedy for the act prohibited the party injured may bring an action on the Stat itself for the Recovery of damages

{1 Co 229-6 Mod 26-7-

So when an individual is Civilly injured by another he may have a Civil suit on the Stat to obtain Redress {4 Bac. Ab 613-10 Co 74-6

Whenever the Stat inflicts a Penalty upon any one for the violation of another Right or interest And the Penalty is not abrogated by Stat it shall go to the injured & not to the King {1 Inst. 114-3 Law 290-

Thus as Stat of a Certain discription on which qui tam actions will be sustained

& the Rule is that when an Offence immediately injurious to the Public only puni-
shable by a Penalty part of which goes to
the Prosecutor - any individual may sus-
tain a qui tam action {1 Com 227. 4 Co
19 - 1 Bac 37 - Dyer 95

But when the Offence is immediately in-
jurious to the Public only no individual
can sustain a qui tam action against the
Offender unless the Penalty or some Certain
part be given to the Prosecutor. 1 Bac 37 - note
1 - 2 - Hawk 377 -

But if a Stat prohibits an Offence immed-
iately injurious to an individual as well
as the Public the Party injured may main-
tain an action and Recover damages all
tho no part of the Penalty accrues to him

{2 Hawk 377 - 1 Bac 37 - 4 Co 17. a
{1 Eas 134 Cro Jac 134

When a Penal Stat expressly allots the whole
penalty to the Prosecutor he may sue
for it alone without joining the King
& Possibly the Penalty may be the sum

Where a Penalty is given partly to the King & partly to him who will Prosecut for the same the King may Prosecute & Recover the whole - It is not becaus an indivicual has a Claim to the Penalty that is given him - but for the more effectual enforcing the Law by by this stimulating indivicuals to prosecute - 3 Bac Abr 162 - 2 Haw 275 - 11 Co 65 b. 66 a

& by Ld Ch 136 -

A bona fide Consideration or acquittal on a ejuitam prosecution is a Bar to all prosecutions for the same offence - but the Rule Requires the acquittal or Conviction to be bona fide, for it has not been unfrequent that the offender (that) has procured a friend of his to Commence the Suit to frustrate the suit or prevent the actions - but this evil was in some measure Remedied by the Stat 4 Hen 7 ch which enacts that no Recovery otherwise then by verdict - obtained by Collusion in a Popular action shall be a bar to any other action prosecuted bona fide

3 Bac Abr 162 - 11 Co 65 b Cro Car 480 - 1 Bac Ab 41 - Cro Eliz 261 - Hobart 209 - 3 Bac Abr 142 - 3 - 2 Haw 278 -

Read this page for the premium one & this for that for it's a blunder (in me — R. K.

where part of the Penalty is given to the poor or to a Corporation or is to be expended in a particular manner as is sometimes the case 6 I. Cow 229 —

In conformity to the Rules qui tam actions are maintainable in Court by the Party injured in Case of forgery, Perjury, theft & Breaches of the Peace — It is laid down as a gent Rule that when a fine is given to the King & a Civil Remedy is given to the individual injured — the fine may be inflicted of Course on the Recovery in a Civil suit — But in this Country the fine is not inflicted unless the injured party has it — 6 Caath 390 — 2 Bac. 206 — 5 do 191 — 3 —

When no particular form of action is prescribed for the Recovery of Statutory penalties the action of debt is the proper one & indeed it almost the only one made use of tho it seems an action of Indebitatus Assumpsit would lie as it is maintainable where debt is — But the former is the more Convenient action 6 Esh Dig 7 — 7 Caath 92 — 2 Law 252. Hopk 175. 4 Bac 653

hen a Stat inflicts a Penalty & gives it to any
- who will prosecute no one has any to
- Penalty until he has obtained a Convic
on - altho he has commenced a prosecut
- he has an inchoate right which is Con
nated by Judgt & 2 Blac Rep 237- Stra 1169-
ar 142-3-2 Hen Blac 310-1- 2 Blac 437-
et in Penifical or Remedial Stat is oth
ein & 4 Blac 311-
n the former Case when the whole penal
s given to the Prosecutor - the King may Re
e it before Prosecution either by written
ecan or by Pardon & 11 Co 68- Cro Eliz 198-2
e 437- Hut 82-
t after the prosecution is one Commune
the King cannot in any Stage its prosecu
neither can he order a Non suit
& 2 Blac 437- 2 Hawk 245-6
d where the Penalty is given to the par
njured it is not in the Power of the
g to Stop the Prosecution in any way-
that part of the Stat is Remedial
& 2 Hawk 245-6- 2 Hen B. 311-

It seems that a prosecutor in a qui tam action may release after the Recovery of the Penalty but never before for it would in that case be no bar to another Prosecution

By the Stat 4 Ed King 4 it was provided that no Common Recovery should bar another action in a Popular Prosecution

1 Bac 391 - 3 Co 44 - Vin. Ab. 66

At Com-Law a bona fide Release after Convict ion cannot bar the King, his right of Prosecu tion for his part of the Penalty — 11 Co 61 - 6 -

It has been determined that a prosecutor ca nnot Compound with the Deft - until after answer made in Court & then not without leave of the Court under pain of the Pillory And leave will not be granted without sufficient Reason by the Parties - 1 Bac 43 - 1 Bos & Pull 18. 4 Term Rep 98 —

And if the prosecutor in a popular action does Release, withdraw, die, or suffer a Non suit - the King may proceed with the pro secution — or begin a new suit 11 Co 65 b - 66. a - 5 Co 48 b - 3 Blac 162 —

If two or more are tried and convicted in a Popular action for the same unlawful act but one Penalty inflicted – But if this prosecution is by indictment or information the Penalty is Recovered for each – the Reason given for this distinction is that the forfeiture is Recovered in satisfaction of Debt & as such is charged while the latter is inflicted as a Punishment – Cro E. 480 – Salk. 182. 4 Ter Rep. 109 – Bull N. P. 189 – Cow. 610 –

When several acts are committed in Continuity being but parts of one offence – But one Penalty can be Recovered – Cow 640 –

It is a gen.t Rule that in all Popular actions the Pff is entitled to no Costs unless expressly given by Stat – But when the Penalty is given as a Satisfaction to the party injured otherwise 6 Mod. 42 – 311 – 319 – Salk 216 – 1 H Blac 10 –

This Ends the Municipal Law –

Private Relations Lec 1st Jus 22nd July 1813

The three great Relations in private life are first, That of Master and Servant: Second that of Husband and wife & Third, that of Parent and Child, Besides these there is a fourth which is only substituted for the last that of Guardian and Ward first then of

Masters and Servant

A Servant is one who is subject to the Personal Authority of another. A Master is one who exercises such Authority. This authority must be Personal to Constitute a Servant for one subject to Civil Authority is not a Servant. This Authority of the Master in general in consequence of some agreement between himself and the Servant, his Parent or Guardian. The Law of England acknowledges but four kinds of Servants (Viz). 1st Menial Servants or Domestics 2nd Apprentices, 3rd Laborers, 4th Servants pro tempore as Stewards Bailiffs & factors. Whereas the Law of Connecticut allows

Master and Servant

Six Species Viz. 1. Slaves. 2d Apprentices. 3d Menial Servants 4th Day Labourers. 5th Agents of every kind and 6th Debtors Assigned in Service by Statute — At Common Law Slaves and Debtors are not known — 1st B.C. 449. 1 wood 468 — 464 Salk 666 — —

of Slaves. It has been doubted whether our Law Authorised the holding of Slaves. if Legitimate Slavery was ever Authorised in Commencement it must have been by Natural Law — Common Law or Local Law. If Slavery is Authorised by Natural Law it is in three Cases. By Capture in war. by Contract or by being born a Slave — As to Capture in War it is said. the Captor has a Right to kill his enemy & therefore has a Right to deprive him of his Liberty. this position is not Correct and the Conclusion of Commencement must be inaccurate. — 2. Burlemark 211. 1 B.C. 449 —

As to Contract. a Contract cannot make a Person strictly a Slave. Strict Slavery gives

Master and Servant

one Power over the life of another, this no man can grant because it is not his own a Surrender of a Mans Liberty is a Resign of his Moral agency which Cannot be done 1 B. Commentaries 449-

Slavery by Birth, this supposes a previous Slavery which we have seen Cannot be — Slavery is not Authorised by the Com. Law nor Can the Local Law of any Country be inforced in England, If a Slave land in England he is *ipso facto* free. Salk 666-425 sect 1- In England we do not the term of Slavery they had Villiens but they were meerly Slaves, for they have some Rights, But this was abolished when the Restoration of Charles 2nd in 1660. There is now no species of Slavery in England Litt sect 189. 194 -204- 2 B.C 94-96- 3 Vol Rume 309 — the word Villien was one synonomous with Slave & he was the servant; In Comm. however Slavery is legalized. It has been decided here that Negroes will not

Masters and Servants

lie for taking a Slave - But an action on the Case will lie for taking or seducing away a Slave, Coupre says this action is Trespass but he is mistaken, a Slave may hold Property and sue for it by his next friend, he may be a Devisee & Legatee or he may take by Descent - A Slave cannot make Contracts, but his Master must not take his property from him for if he does an action lies in favor of the Slave against the Master to Recover it -
If the Slave marries with the Masters Consent he is ipso facto free for he has made a new relation inconsistent with his former one, if he marries without the Consent of his Master he is not free. The Same is true as it Respects a minor Child 3 Term Rep 356, 2 Henry B. 511 2 B.C. 93 -
If a Negro marry a free man She is free during Coverture, if She marries a Lord She is free during Life, and if She marries a

Slave she is a Slave still — By usage in Conn an ill
egitimate Child follows the Condition of its mo
ther. In England by the Com. law it follo
ws the Condition of the father. . Independant
of the usage an Illegitimate Child cannot
become a Slave in Connecticut. Swift Law 177
-189 2 B.C. 698

In Connecticut the Importation of Slaves is
entirely forbidden And the Children born
of Slaves between the 1st of March 1788 and the
1st of August 1797 are to become free at the age
of 25 and all born after said first day of
August 1797 to be free as if born of free Pa
rents — See Statute of Connecticut —

In England tho' there is not private personal
Slavery, Yet Offenders may Judicially be
condemned to Slavery as a punishment (ie
confinfined in Newgate —

Apprentice from a French word signify-
ing to learn — the reason of which. that
those Servants who come under this des
cription are generally Bound out to get Instruction
1. B.C. 426 —

It is a Rule of the Com. Law that every Apprent
ice Must be bound by Deed. A Parol Contract
is not binding on the Parties. There is no
other instance in which deed is necessary to make
a Personal Contract at Com. Law. The re
ason is that the personal Liberty of the App
rentice is too sacred to be parted with by
Parol - 6 Mod 182 2 Ld R. 117 Sir 68 2 Ld R. 64-492.

It has been decided that a defective Con
tract of Apprenticeship cannot be Constru
ed into any other Special Contract. The deed
is void entirely 8 Ln R. 379.

It was formerly said that there could be no
such Relation as Master and Servant in Ap
prenticeship unless the latter was design
ated by the express name of Apprentice.
This is no denied to be Law - the intent
ion must govern but the words be what
they will - 1 Burn 57 3 Bac 546 1 East 333 8
Lenn 6 Esp 379.

All other Spicies of Servants may be Created
and Retained by Parol Contract 3 Bac. 546

By Several Statutes in England the Children of Poor Persons (ie) Paupers, may be bound out Apprentices by the overseers with the Consent of two Justices, untill they arive at the age of 21 - The Persons on whom such poor are Bound must take them or forfeit a penalty or fine 1 B.C 453 or 428 - -

In Connecticut we have a Similar Law except that no Person is obliged to take such (Person as) Apprentice or forfeit a Penalty

As Servants except Apprentices are entitled to wages for Service done, when there is no expres agreement as to the Sum the Servant shall Recover in a Quantum Meruit - the wages of Menial Servants are to be fixed by the Parties - Those of day Labourers by Statute and to be settled by the Sheriff of the County or a Justice of the Sessions - 1. B. C. 452 or 428 -

In Connecticut the wages of all Servants are Settled by the Parties - and so it is in England except with Labourers in husbandry

If the indentures of an Apprentice are silent as to wages, he can recover none tho. he may recover them by Special Contract & Term Rep 379. 1 B. Com. 452 -

The Stat 5 Eliz provides that minors may bind themselves by their own Contracts of Apprenticeship - But according to the construction put upon this Statute they are not liable upon their Covenants - They are liable as long as the Relation of Master & Servant Continues de facto and no longer if he serves his full time he is free of his trade, Cro Jacks 479 Cro Car 448 - 179 Mod 190 Doug. 501 - 1 18 1 T. Rep 716 - The Rule therefore as to the Minors Servants liability Remains the same as at Com. Law the Statute Notwithstanding - If the Father or the Guardian join in the Indentures with the Minor he is bound by the Covenant that the Minor shall serve as an Apprentice but the Apprentice himself is not liable - The Master is bound of

Course to provide Necessaries for Apprentices or
by otherwise agreed and being in loco parentis
he is bound to protect him, here ill usage is good Cause for the Apprentice to
leave the Service of his Master. 1 Atk. 518

Misuse is a good Plea in Bar if the Servant is sued, and a good Cause of Action against the Master for Costs —
It is said an Apprentice Cannot leave his Master but by Deed. It is true he cannot be discharged from a Contract express except by deed, but in Case of Personal abuse he is discharged without deed — The Master however is still liable on the Contract — Lord R. 1117 Salk. 68 6 Mod. 182 —

The meaning of Rule is that the servant Cannot be discharged in any other way but by deed — for the maxim of the Law is Eo ligamine quo ligatur — But the Contract may be otherwise destroy, the Indentures may be Cancelled by both parties or one may deliver up his Indentures

to the other which destroys the Contract on his part, 4th 582 Doug. 249. 250 / 16 D. 174 / Term Rep 638 —

In most of the New England States and in the State of New York there are Statutes enabling the Courts of Common Pleas in Case of any Breach of duty or default of the Master to discharge the Servant and in Case of default of the Servant to Punish him at Discretion Statute of New York &c —

In Carion / if the Master turns away the Servant without the Consent of his Parent or Guardian he cannot Retain him or Recover on the Contract But the Servant, his Parent or Guardian may Recover on the Contract — / Day. Doug 183

In England there are three forms by which the Apprentice may be discharged viz By Complaint to the quarter Sessions — This duty is exercised in England only when the binding was by the agency of the Law, as by Magistrates at

also in the other two Cases (ie) when the binding is by two Parties or by one with the liberty of Appeal to quarter Sessions - But in Connecticut in all Cases 5 Bac 550 1 B.C 456 —

The Master may also apply as well the Apprentice and procure a discharge for a Reasonable Cause — By Com. Law the Master could not assign his Apprentice because the Contract was Personal Hob 134 1 Keb 250 — The Education and Morals of the Apprentice are to be attended to by the Master Salk 68 12 Mod 553 3 Bac 555

An award of arbitrators that he shall be assigned is void. unless the Apprentice consents. A Contract of Assignment is good however as between the Assignor and the Assignee. The Assignor is liable on his Contract — The reason in the Rules of Law against assignment was intended for the advantage of the Servant merely and not for the Master 2 Str 12-67 2 Ld R. 83 Salk 68 Vid. 9 c. D. 69 —

But if on such assignment the Servant goes
into the Service of the Assignee, he acquires
from all the Right he had under his former
Master — he acquires a Settlement —
Mr Gould supposes he would become free of
his Trade if he he served in Pursuance of his
Indentures on the same Principal the Mas-
ter must keep the Apprentice under his
own Care and not send him abroad to im-
prove in his Trade unless the Terms of the
Indentures allow it or the Nature of the
employment Requires it Hobt 134 8 Mod
236 12 Mod 446 Sa. Ca. 683
on the same Ground that the Master can-
not Assign, after his death the Executors
of the Master cannot hold the Apprentice
to Service; Strange 1264 Sal 68. 2 Ld Raym 65
It has been said that the Executors are
bound to learn or to procure to be taught the
the Apprentice of the Testator 1 Lev 177-
1 Siv 216 — This has been denied by the Law
2 Strange 1276 Sal. 66. & somebody else 296 —

Whether the apprentice is to be furnished with Clothing and diet by the Executor of the Master is not settled. According to the Current of Authorities says Mr Gould he is bound to furnish necessaries according to the Contract of the Master, but need not teach him in his trade or profession. This he says is a hard Rule and appears not to be founded in Principle. The Reason why the Master furnished him with Necessaries was on account of the benefit he Rec'd from his services But the Executor cannot hold the Apprentice hence the Mutuality of the Contract is destroyed. Mr Gould says the Ground of the Rule is the Covenants are independant of Each other. The Master does not expressly Covenant to furnish Necessaries for services Nor does the Apprentice Covenant to serve for necessaries. The Court suppose the Covenants independant of Each other and that Performance by one Party need not be averred in the declaration to enable

him to Recover against the other party
2 Salk 41 Cro. Eliz. 553 1 Keb 761-820 1 Raym Cas
30

The Parties should have Covenanted otherwise expressly so that they may be ascertained — A premium is often given to the Master besides the Services of the Apprentice. If the Master dies before the Term expires the Executor ought to Refund a part of the premium or furnish another — Part Restoration in England is in this Case matter of Equitable Jurisdiction. Courts of Law will not order Restoration in this Case unless Provision is made for it in the Indenture. In one Case A Court of Chancery went further than this even beyond Principle. The Parties had agreed upon Restoration if the Master died before such a time. but the Chancellor decreed more than the Parties agreed upon. 1 Vern 460 Finch 496 Abr 149.

If the Master turns away the Apprentice

and he dies not Return the Master must refund a proportionable part of the Premium 2 Vez 64

It has been holden that if the Master became a bankrupt, the Assignees may be Compelled by Chancery to Refund part of the Premium But the Court of Sessions, Justices &c are authorized Not only to discharge the Apprentice in this Case but to Compell the Assignee to Refund and the Right of Restoration arises from the discharge. why then Resort to Chancery

1 Atk 149 3. Bac. 540 1 Stra 532 12 Mod 415 Salk 69-490 11 Mod 410 1 B. Com. 452.

Whatever an Apprentice earns by his labor or while he is so is the Masters.

If he Receives Money it is the Masters, and the Property earned by the Apprentice may be Recovered in any form of Action against the Person who is bound (who is bound) to pay it in favor of the Master 6 Mod 69 1 Ver 488-83. Salk 68 Stra. 582 12 Mod 416

Menial Servants day Labourers &c may acqui-re Property and it shall be their if they do not neglect the Service of their Master

Sect. 117

If they Neglect the Service of their Master an Action will lie against them or their employer. 3 Bac. 564 Cro. Jac 653-2 Lw 633

If an Apprentice or any other Servant is entited away from their Master &c. action will lie against the entiser if he had the means of Knowledge that the Service of the Servant was due to another. A Journeyman is within this Rule Cap. 65. 3 Vin 20

The form of Action differs in the Case If one takes a Servant by force Trespass vi et armis will lie. for entising Case seems to be the proper Action - 2 Lord R. 1117 1 Wood 146. Salk 380

In a Case in Cro Jac the first of the action was entisement and yet this was Called Trespass Quare was not this a mistake. I can-not say Mr Dowd be Reconciled to the General Rule 3 Bac 564 2 Ld Ray 167. Lord Ray 1032

In England an Apprentice gains a settlement in the Place where he Resided the last 40 days – In Com. he gains no settlement by his Apprenticeship – 240 – 487

Menial Servants They are so Called because they are domestic Servants and generally employed in the house. It is a general Rule of Com. Law that if no term of time is agreed upon by the Parties for the Continuance of the Servant in the Service of the Master, it shall be Construed to have been for one year This is founded on the equitable principle that the Servant shall serve and the Master Maintain him throughout the Revolutions of the Year 1. B.C. 425

3 Bac 546 Finch 168

In Connecticut this is not Law. By the Stat of Eliz a Menial Servant Cannot leave his Master nor the Master his Servant without giving a quarters warning – Not so in Connecticut

Day Labourers. By Stat 5th Eliz and 6th of Geo 1st all Persons having no visible means of Subsistence may be Compelled to Labor at wages fixed by the Justices of the Sessions. and Penalties are inflicted on such as give or exact more wages than are so settled — This Law has never been obtained in the State of Conn. 1 B.L. 423 —

Agents They are various as factors Brokers, Clerks, Stewards, Attorneys, Ship Masters &c — they are not Servants in the same sense as the preceding are they are so only as it Relates the Property of their employers. they are not subject to the Personal Control. and the employer is Called Principal and the employed Agent — 1. B.L. 424 1 Wash 469 Amalie 252 — 297 — 298 —

Agents must act for their Masters according to the Contract whether express or implied for many duties and Rights arise out of the employment to which it is presumed the Parties have agreed 1 Wash

469

Where agents pursue their instructions strictly they are not liable for Casual Losses, if they do not they are — vt supra —

A factor is a foreign agent or Broker one who Remains at home. a factor may Retain the Goods of his Princip al for a particular or general Balance in his own favour. The Balance which is due for the Agency of Specific articles is Called Particular — one due for the Agency of all Goods that have Come to his hands in the time of his Trade or business is Called General. he has a General and Particular Balance where one is due in both ways — Atk 254 1 Bro 495 1st Ca 335

If he sells Goods he has a lien upon those that remain unsold to that Amount, no not on those that are sold and if he buys Goods he has a particular Specific lien upon them Ray 1154 1 Ca 4 vt supra

By Giving up Possession he loses his lien but no his Claim 2 Ca 227. 523 1 Ca 4

When a factor sells Goods he has the same lien upon the Price of the Goods in the hands of the Purchaser as he had upon the goods And he may give notice to the Purchaser not to pay the Principal but himself for the Goods - and if the Purchaser after such notice pays the Principal for such Goods the factor may Recover of him a second payment. But without such Notice payment to the Principal will discharge the debt Camp 251 -

It is said a Factor has no lien on goods not in his actual Possession - a Constructive Possession is a mere Right of possession & Creates no lien - Suppose Goods are sent to B. at Salamanca for the use of C. at Copenhagen the factor of A - B Cannot detain them as against A the Principal or C. the factor for the former may Countermand them while in B's Possession and the latter may Recover them in Trover as being Constructively in Possession 3 Term Rep 119 n

But while the goods remain in the Possession of B. the Factor has no lein and Cannot Claim them as agt. the Principal, They are not bound a Pledge (til the Factor has the actual Possession of them) in the hands of the Factor 1 Atk 134 & 2 Ves 117.

When the duty given to an Agent is discretionary and he has Conducted himself Reasonably he is Not liable for Casualties

But if his instructions are Explicit & Peremptory, as if such a quantity of goods are to be bought for such a Price. - if the factor Buys a Smaller quantity at a greater price, the Principal may if he Please disclaim the Purchase 1. Ves 110.

So if the Price at which are to be sold is fixed and the factor sells for less the loss falls on the factor 4 Com. Dig. 228.

The factor has no Right to Pawn the goods of the Principal and if he does the Principal may Claim them of the Pawnee And after demand of the Pawnee and tender

of the Balance to the Factor may have
Jour against the Pawnee for the Goods
5 Term Rep 604 1 Bos & Pul 648 Stra 1178
The Tender must be to the Factor and not to
the Pawnee (ie) if any thing is due the Factor
from the Principal 1 H.Bl. 362 -
The Factor may buy - or sell the goods of
the Principal in his own name - There
is no Presumption that the vendee should
know whether the vendor is owner or
factor — Mr Gould says that this Rule
is not in Conformity with the general
principles of Master and Servant the reason
is Factors are generally in foreign Countries
and great inconvenience would arise
if forbidden to trade in their own names
1 H.B. 362 Cowp 256 4 Term Rep 359 But Nisi
Prius 139 - 259 -
From the Factors Right to trade in his own
name arises the Right which he has to sell
and be Sued in his own name 1 H.B. 181
An Auctioneer Sells in his own Name tho

it may be known in a particular Instance that he sells for another Person. Coxe 256

2 Henry Blackstone 591 —

If an auctioneer sells for less than he is instructed to he is not liable for the loss because there is an implied Contract on the Part of the owner that they shall go to the highest bidder. Coxe 295

If however an Auctioneer was directed by the owner not to sell them To the highest bidder (for such a Price) under a Certain Price he is bound by the instruction and liable for the loss — Thus if the owner direct the Auctioneer to by a Hogshead of Rum but not to take less than one dollar a Gallon & he does take less he is liable for the loss

Attorneys. are of the same Class of Servants. an Attorney has a lien upon the Papers and Judgment of his Client for his Fees And he may direct the adverse party against whom Judgement is given

to pay the Cost to him and not to his Client. But at Com. Law the Attorney, had a lien upon nothing but his Cost (ie) his taxable fees — A distinction is in Eng. land between Counsellor and Attorney; an Attorney has a lien for his taxable fees but a Counsellor has none but an attf. holds his lien subject to an equitable Closing with the adverse party. Thus A. Recovers of B. 50 dollars, the Attorney of A has taxable fees to that Amount, he ex-cits B. to pay him the amt. and not his Client. But suppose A is insolvent. B. has a Claim of Cost against him in a former suit to the same amount then the Parties will be entitled to a set off and the Attorneys lien will be nothing 1 Vc. Ch. 24-122-217 6-9 2 Ves-40-587 1 Est 464-4 2 Ves Rep & Lum Rep 1-71-1-70 123-6 Term R 361-456 —

An Attorney must execute an instru ment for the Principal in the name of the Principal — If he does in his own

Name he is bound and not the Principal
8 Term Rep 570 9 Coke 76 2 East 142/6 Term Rep 177
The Signature should be thus A. By his attorney B. as B Attorney for A. as B. for A
Chitty on Bills 25-27. 56-75 Stra 705-915 5.1
Term Rep 181 —
An Agent it is said Cannot bind his Principal by Deed, unless his Authority is Created by Deed — Mr Gould says he does not understand the Reason of this Rule. The Agent may in many Cases bind his Principal by acting in pursuance of a Verbal Authority — Thus he may do it by a promise by Parol, suppose he Sells a Horse which he may do by verbal Authority and gives a Deed of Sale which is no part, will not this bind the principal.
If the Rule be Construed Strictly it will not 7 Term Rep 207-9 — 4 Do 313 Com Dig 61-5
However this is not to be Compared with another Rule which is if A in the presence of B. be directed to sign one in

Instrument with B's Name and A does it in his presence B. is bound by it - but A in this case does not act as Attorney it is the same as if B Signed it himself The Person sometimes makes a mark and his name is affixed to it by another

Com. Law Tit Forgery

Judge Reeve says that he never knew an Attorney who was in the habit of Practising in Prop, that in his Career of Practice with success Clearly he never could with honor -

An agent for the Public acting in either a Public or Private Capacity but Contracting for the Public is not liable Personally on such Contract the Chancellor of the Exchequer in England is not liable Personally for any Contracts he makes for the Public - Neither is a Commissary for provisions - 1 Term Rep 172 - 674 1 East 582 1 Root 89 U.S. vs Dexter

The last writer on ---- difficult to find out

Debtors apsigned in Service — This spe
:ies of Servants is unknown to the Comon
Law the Statutes of Comin. Provides that a
Debtor Committed on Execution if no oth
er means are to be found to pay the debt on wh
ich he was imprisioned shall satisfy
the debt by Servis if the Creditor req
uires it and the Sup^r Court think it
Reasonable. Stat of Con^t 58—

Rules when &c appliable to Master & Servant
Generally ——————

As to when the Master is bound by the acts
of the Servants generally and when he
can take advantage of them the Rule
is that those acts of the Servant By the
Masters Command either expres or im
plied are in Contemplation the acts of
the Master. For the maxim of the Law is
qui facit per alium facit per se 1 Just 109
1. Bl. 429 n. It is generally true that all ac
ts done by the Servant in the performance his
Masters business are done by his implied

Command - 1 16. B. 442

Three Clapes of acts done by the Servants are accounted done by the Master - 1st What ever the Servant does by the expres Comm and of the Master. 2nd What ever the Mas ter permits the Servant to do in any parti cular Case - 3d Whatever the Master per mits the Servants to do within the gener al Scope of the general duty of the Mas ter - All Contracts with the Servent as such hawing Authority Competent are in legal Contemplation made with the Master him self. If A employs B. on a particular occasion to buy a horse for him it is an expres Com mand - If a Servan t wishes to buy a Horse and the Master Tells him you may if You Please. this is an expres Permission and if the Contra ct is such as the Servant usually ma kes it is within the Scope of a general Authority tho no expres no expres Comm and or permission is given. As if a Clerk

of a Store purchase or sell goods &c - the Contract may be declared precisely as if the Master himself had made the Contract and the Servants name need not be mentioned in the action — 3 Bac. 559 —

If a Servant is Cheated out of his Master's Property the Master may sue the wrongdoer and Recover. Croke Jac - 223. 1 Rolle 98 —

If the Servant is Robbed of his Master's Property the Master may sue the Hundred on the Statute of Hue & Cry or if the Master is absent at the time of Robbery the Servant may sue but both may not sue —

The Reason why the Servant may sue is because he is liable over to the Master It may be true in some Cases that the Servant is liable over to the Master - Yet says Mr Gould he is not liable in all Cases. He is not liable in the Case of Robbery unless the goods were exposed by his Misconduct — 3 Bac. 65 —

The true Reason of his Right of action

is that the Property by Right of Bailment is his as against all Persons whatsoever except the Master or his Assignee Salk 613 - 3 Mod 287 -

The bare Possession gives him such a qualified Property that he may Recover the goods if Taken from him - 4 Mod 383 11 Mod 8

But when the Master is Present at the time of the Robbery, the goods are deemed to be in the possession of the Master and he only can have an Action thereon. 12 Mod 574 Salk 615. 1 Ld. Raym 148 -

In this Case however they cannot both have their Action. If the Master sues the Servant or the Servant is Bound and so if the Servant sues the Master is bound - and so even a bare Commencement of an Action by one may be Pleaded in Bar to an Action of the other. And the same Rule obtains in the Case of goods taken by a mere wrong doer - Carth 145 Salk 129 -

When the Servant Brings this Action he must declare upon Possession by himself as if the goods were his own (i.) privately as the Master would if he Sued 2 Lawr 79-397-8 Mod 289 This is a Rule of Pleading and nothing furnishes so good evidence of Law as a Rule of Pleading — Lord Coke calls Pleading the Key of the Law —

The Master if his money is gained from his Servant by an Illigal Contract may Recover it in the same manner as if he himself was defrauded. But if the Servant squanders it he cannot Recover it and his Remedy is against the Servant. This goes on the ground that the acts of the Servant are the acts of the Master, for if the Master himself had acted in these Cases in one he could and in the other he could not Recover 3 Burr 1899 1836.430 —

An Inn Keeper if his Servants Robbs his Guests is liable and if his Servant sells bad liquor he is liable. But it is said if the

Liquor is bad and unhealthy that he is not liable for he only acts as Servant 8. Coke 32 Dyer 266 1 B.C. 430 1 Rol Rep 95 - 2 Bac 995 - 563

This Rule says Mr. Gould seems to be very questionable — Suppose a Servant should infuse Poison in the Guest's Liquor either by the Command of his Master the Innkeeper or a Voluntary and the Guest should die. The Servant would be guilty of Murder. So if he should infuse a slow Poison that should injure the health of the Guest. it would seem a fortiori that he must be liable Civiliter — 1 Wilson 328 —

The act is itself a wrong and willfully done, for when a Person does an act which he has no Right to do by the Command of another he is as liable as if he had done it himself fully. But his liability does not excuse the liability of his Master — 5 Bac 563 1. B. 456 —

The Servant is bound to obey the lawful Commands of his Master & those alone, Esp.

Dig 580-1-2-3-4-5-6-7-8

If a Clerk in a Store Misrepresent the qual
ity of the goods it is the prevailing opinion
that he does right in lying for his Master
but this does not alter the Law on the
Subject - it is said if the Servant does a
wrong of which he is ignorant he is
not liable - thus if the Master locks up
a man and gives the Key to his Servant
who is ignorant of the false imprision
=ment he is not liable, being the involun
tary instrument of his Masters vengeance
and doing an act in itself unlawful
But if the act is itself unlawful or ac
=companied with what the Law deems foul
the Servant is liable whether he Knows
the act to be unlawful or not - Thus if
A Commands his Servant to Cut down a
a Grove of Trees and he does he is liable
tho' he Knew not that the Grove belonged
to B. The Law of Trespass does not Consid
er the intention but the Injury 2. B. Rep
892 — Those acts of the Servant done with=
=out

the Command of his Master either express or implied are not considered the acts of the Master and he is not liable therefor. But the Servant only, 2 Salk 282 10 Co. 456 8 Term Rep 553 Show. 228—

So if the Servant not having express authority enters into a Contract not in discharge of his Masters business he is bound by it himself—3. Bac 562 —

But in such Case if the Master after wards consents to the Contract he is bound by it This is no exception to the General Rule for it becomes the Masters Personal Contract. it has been recently decided in England that if a Servant while doing his Masters business wilfully Commits a Crime the Master is not liable 1 East 106

The Case was the action was Brought against the Master where the Servant drove his Masters Carriage against another and held not liable to lie 1 Bos & P. 472 Salk. 441 Note—

If a Servant through want of Skill or

Negligence in his Master's business injures a man the Master is liable—Thus if a Servant thro' want of Skill or negligence in driving by a Carriage Breaks or injures it the Master is liable—2 T Rep 762 Cowp 406—
The Master is bound as to third Persons to provide a Skillful Servant—but he is not the insurer against the boisterous and sinful Passion of his Servant 1 Carr 106—
2 H.B. 442—6 T. Rep 125 5 do 648. 3 B.C. 443-457
A Servant negligently drove his Masters Cart against the Cart of another and the Master was liable 2 Salk 44. 2 Ray 439—
In a like Case the Servant drove over a boy, and the Master was liable 2 Salk 431 Wood 465. 5 Ben. 562—
A Surgeon's Apprentice thro' negligence in attempting to Cure a wound injured the man and the Master was liable 2 Roll 639—
If a Blacksmiths Servant injures a horse in Shoeing the Master is liable 1 B.C. 459

A man lately Brought an action on the Case against a Master whose Servant had wilfully driven a Cart over him it was not sustained, because the Court said it ought to have been Trespass vi et armis - The decision says Mr Gould was Right and the Reason wrong - Case was the Proper action in like Cases but in this the Master was in no way Liable - 6 T. Rep. 125

In a Certain Case it was soon after decided that to Recover for a Servants negligence a Trespass on the Case and not Trespass vi et armis was the proper action - In this Case it was hinted that an action of Trespass vi et armis against the Master for wilfully driving his Cart agt another - was in deed that any action against the Master would Lie 1 East 106

Where the Master is liable for a Joinble injury Committed not by his Command and the Remedy is Case - Where he is liable for the neglect of his Servant

Case is the proper Remedy and in neither Case is the Master held to be liable for a breach of the Peace. for he is liable in neither Case only by fiction or imputation of Law. He cannot be subjected Criminaliter by legal imputation - for the maxim is fictione juris cessat equitas - But if the Master is liable in Trespass he is liable Criminaliter for Breach of the Peace. but this is not so proved and therefore he is not liable in Trespass for the acts of his Servant, which are not done by his Command either express or Implied -

If A's Servant employs the Servant of another to do the business of A. which latter Servant by his negligence injures a Stranger. A the original Master is liable as well as the Servant by whose negligence the injury happened —

1 B. & P. 404 6 T. Rep 411 -

Mr Gould doubts this principle tho he

he does not undertake to say, it is not Lecu
no action will lie against the intermediate
Servant or him who employed the wrong
doer — 6 Tu Rep 411 — But if the doubts of
Mr Gould be founded in principle it
will follow that he who employed the
wrong doer is liable
The Master is not liable for the wilful tor
ts of his Servants Lec. Ray 911 —
This Rule Mr Gould thinks tho there is
no decision precisely in point, applies
ies to those Cases only where there is no
privity of Contract between the Master
and the Party injured Express or implied
Jones 93. 3 B.C. 165 — 1 H.B. 168 —
If a Blacksmiths Servant in shoeing
a horse wilfully lames him the Master
is liable on account of an implied
Contract that the business shall be well
ll done — So if the Master sends his
Servant to New Haven with a waggon
and goes before and makes a special

warranty with all he meets that the Servant shall not injure their Carriages no doubt but what the Master would be liable in the Case of a wilful injury. -
From the analogy of Master and Servant to Post-Master and Deputy attempts have been made in England to subject the Post Master for the defaults of the Deputies — it is now settled that they are not liable — Salk 17 Carth 489 Cowp 754 3 Wilson 443 —

This doctrine is founded on sound principle the Post Master is himself a Servant — he Contracts with the Public for the faithful discharge of his duty for his hire — The public has the Postage and Compensates him for his trouble by wages. In analogy to the principle that the intermediate Servant is not liable for the acts of the under Servants altho he hired him - the Post Master is not liable — But the Post Master is liable for his own faults as do an

all his Deputies for theirs – Esp. Dig. 628 Comp
765 – 2 B. Rich 906

The Post Master is liable for any extortion practiced in his office – and if money is obtained by any illegality the injured Person may have an action of Indebitatus Assumpsit against the Post Master himself – Cowp 182 Arno 480 Ld Ray 224

It has been ruled that if the mail be Robbed of money the Public are not liable this Case tho here I suppose it Comes in

Contracts of the Servant – Masters liability for. It is a general Rule that the Master is bound by the Contracts of his Servant made for him when the Servant acts within the Scope of his Authority and his Authority may be general or special Express or implied. 3. Salk 234 1 B.C. 547 2 Ver 543 – 643 3 L Ray 765 8 do 531 –

A General authority is one when a person is not confined to individuals contracts

but which extends to Contracts generally as to all Contracts of a Certain Kind or discri=ption - as in Case of Stewards & Clerks in a Store or when one is employed to make all sorts of Contracts - - - A Spicial Auth=ority is one which is Confined to one or more individual Contracts or transactio=n as if a man was employed to buy or sell a House or farm for another an exp=ss Authority is so given - A General Au=thority may be implied from the Masters General or usual Routine - as when one em=ploys a Steward to Purchase necessaries A Spicial Authority may be implied. tho' it rarely happens. if a Servant makes a in his Masters presence and expressly for his Master and the Master does not prohibit him, his Silence and acquies=cence are Construed into an Authority implied for the maxim is qui non prohibet cum prohibere possit jubet

1 B & C 431 Powell 131 - 132 -

If the Servant has been in the habit purchasing Goods with money and never upon Credit the Master is not bound by any purchases of his upon Credit - This tho the articles are the same as those for which he paid the Reason is the Servant has not been in the habit of taking up Goods upon Credit If the Master permits the servant to take up Goods on Credit it is otherwise 1 Bl. 430 3 Salk 234 1 Show 95—

But in general if the Servant Purchase Goods without prior Authority which Come to the use of his Master the Master is liable tho no Credit had been given to the Servant before. Chit 26 3 Keeble 625—

This using the articles is Construed into a Consent Subsequent which in Law is a Ratification ab-initio

Suppose the Master had given him no Authority either express or implied but had given him money to buy certain Articles - the Servant Embezzles the

money - purchases the articles on trust the Master supposing them paid for was th=en - Is he liable? See L. Ray 224 3 Salk 234 3 T. Rep 760 10 Mod 110 - By which point of his liability is unsettled — But Mr. You=ld thinks the Master not liable — In othe cases the Law proceeds on the ground of ap=ent subsequently, by using them — But in the present case the Master knew nothing of the Trust and cannot be supp=osed to consent to that of which he has no knowledge - the Master did not in=tend to give his Servant Trust with the Trade but the Trader was so incautious as to Trust him & the Gen.l Rule is that if one of two innocent Persons must suff=er by the act of another the loss ought to fall upon him who Trusted the Rogue If the Master has permitted his Servant to Trade in his own name on Credit he may prevent it by forbidding one person in particular or by advertising to People gen

erally not to Trust him — But a private dissolution of the Relation of Master and Servant will not procure his effect — The Rule is the dissolution as to Authority not to Trust must be as Public as the Credit before given to the Servant — Chit 26 3 T Rep 760 Peake 42 — 4 Esp 212 Mood 346

If the Servant in Making a Particular Contract such as Selling goods makes a warranty as to the quality the Master is bound by it — unless he expressly Commands the Servant not to make it 1 Salk 289 1 Show 177 3 Mod 95 — 7 Mod 7 — Salk 289

When the Servant in making a Contract of warranty acts within the Scope of his Authority even an express restriction not made public & not made known to the purchaser will not save the Master Stra 501 — 634 — 1 Esp Rep 111 —

But if the Master have expressly forbidden the Servant making the warranty the Master is not liable 10 Mod 109 E. Dig 630 —

If the Servant has been in the practice of Sellin=g and warranting his Masters Horses with the Masters Consent the Master is bound by the Servants warranty notwithstand=ing any private restriction unknown to the Purchaser — But if the Servant is permitted to sell a particulier Horse with an ex=press restriction not to warrant he is not bound by the warranty of the Servant & the Servant had no general Authority to warrant — 3 T Rep 760 — 11 — 16 of Mod 109 —

But if the Servant had no right to Sell the Purchaser cannot even hold the Horse against the Master — The purchaser takes this Risque upon himself and as to the he takes the risque upon himself as to the Servants Right of warranty —

Jon Croke Jac P. 469 - South v Moore is a Case like this - A having a Counterfe=it Jewel entrusts it to B. to Sell to a Barbary King - B. delivers it to a Barbe=ry broker who Sold it to the King - he discovered the Counterfeit and took from

C. £800. C. Said the original owner to Recover what he had Paid - it was held that the action would not lie because A did not expressly direct his Servant B. to warrant it - But conceiving to the Rule just laid down he would have him liable for he did not expressly forbid the Servant not to warrant — See 1 Rol Rep. 90. Poph. 123 - 143 - 2 Bac Ab 95 2 Roll Rep 5 —

Another Case is found in the Books equally questionable - It is said if a Master commits his Servant to Sell a Horse at a public Fair and does not tell him to Sell it to any particular Person he is not liable on an implied warranty that the horse is Sound Salk 282 Str 653 3 T Rep 757

If a Merchants Clerk sells the Goods of his Master and misrepresents the quality of them the Master is liable 4 T. Rep 177

The Servant is not Regularly liable for the Contracts he makes for his Master but if the Servant takes upon himself expressly the responsibility he may be made

liable on such Contracts and when he does
he does not act in the Capacity of a Ser
vant but in his own Right in the Serv
=ant of his Master — 1 Roll 95 3 Bac 563 —
When the Servant makes a Contract when
he has no Authority express or implied
and by which his Master is not bound
the Servant is liable personally —
Any one who acts under another's autho
rity and for him must be considered his
Servant pro tempore — thus if a wife
make a Contract for her husband he can
=not be bound for she by reason of her Cov
erture Cannot and thus if a minor Con
=tract for his Parent or Guardian 1. B.C.
430 — our Statute P. 487 has introduced a
new Rule on this subject
of The Servants liability for his faults and
actions between his Master and Strangers —
acts of the Servant not done by the Commis
sion of his Master express or implied are
not binding on the Master
Skin 228 - 1. B.C. 431 —

It is also generally true that acts so done by the Servant (Skin 228) 3.B.C 462 —

For the purpose of determining what acts are not in fact or in Law done by the Masters Command it is to be observed as before that all acts done in discharge of the Masters business & of the authority with which he is entrusted by the Master are deemed to be done by the Masters Command express or implied and are therefore not binding on the Servant or the Servant — Salk 18 —

But all acts done out of such authority &c - do not bind the Master - hence it follows that such acts do Regularly bind the Servant — C. Dig 603 —

Thus the Master is not generally liable for the wilful Torts of his Servants because they were not Committed in the Masters business. but the Servant alone is liable unless there is privity of Contract Cro. Eliz 175 -

If a Servant in performing his Masters business does an injury to any one through -

negligence ignorance or want of skill the Master and Servant are both liable provided the transaction in which the Servant was engaged was not founded on any Contr=act between the Master and the party injured — Sta 1083 - 1 Wil 328 Tom Ray 220 6 Mod 411 - 125 — A Person Committing a Trespass is liable to any whosoever authority he acts — Esp. Dig. 380 = 386

The Law of Trespass does not regard the intent when the action is Brought immediately against the Person injuring - If a Servent drives his Masters Carriage against the per=son of another he is liable whether it be done wilfully or not

But if the transaction in which the Servant was engaged at the time of the negligent injury, was founded on a Contract expres or implied between the Master and the Person injured the Master alone is liable and the Servant not — Says Mr Gould I do not finds the negative part of the Rule that the Servant is not liable

laid down in the Book. But I apprehend the Case will Support the Position — Suppose the Apprentice of a Blacksmith lames a Horse thro' negligence the Master alone is liable the Servant Cannot be Considered a Bailee or a wrong doer — nay if the Blacksmith himself had done it he would not have been a Bailee because of the Bailment — he has Lawful Possession and so has the Servant Salk 386-603. Coiop 506 —

The injured party has no Right to Complain except as to the injury Consisting in a breach of the implied Contract to Shoe the Horse will the Privity of Contract, puts Tort out of the question — If the Servant Can be no part to the Contract the Master alone is liable — To this Rule there is one exception and the Reason of it Strengthens the Rule just laid down. The Master of a Ship as well as the owner is liable to the freighter for any damage occasioned by his negligence (i.e) the negligence of the Master even tho' the freighting was found on the Contract

of the owner and freighter only, — Salk 440
Carr 58 - 6 T. Rep 125 1 Vent 190 - 198 & 238 —
The owner and freighter are often Citizens
of different Countries and the Rule is found
-ed upon general Convenience and Policy,
The Master in this Case visits both Countries
and is Rather an officer of the owner than
a Servant tho he is subject to the Rule of
Master and Servant —
If the Servant Commits a wilful Tort he
is liable in all Cases to the Party injured
even tho the Transaction was founded on a
Contract between the Master and the Person
injured (ie) he is liable whether it violated
the Contract or not and the Master is al
so liable if it is a Breach of the Contract
Thus Suppose the Servant of a Blacksmith
wilfully leaves a horse of another this is
his own act and that done in the per
-formance of his Masters business —
An action of Inadibitatus Assumpsit wi
-ll not not lie against an officer of the
Revenue for an over payment of Money

to him but application must be made to the Government under which he acts - for he Receives it for the Government not for himself — But an action will lie against a Revenue or any Public officer for money illigally extorted from an individual. for him he acts for himself and it is his own wilful wrong — Cowh 69-162 If an Attorney Brings an action for an other person when he knows there is a Re=lease of the Cause of action he is not lia=ble for the Suit. because say the Books he is a Servant - the true Reason is that the Attorney is not to decide whether his Client Shall Bring the Action he can only advise - 1 Roll 95 1 Mod 209 2 Dan 295 There must be no fraud however on the part of the Attorney for there is no more Privilge on account of his profession than any other man — So when the Plaintiffs Attorney enters up Judgement against the Defendant after having Suffered a Non Suit he is held to be liable Rutton 125 E Dig 188 —

The Servant is in many Cases liable for injuries done to the Master – he is in Gener=al liable for all wilful wrongs and neg=ligence by which the Master is injured

1 Wood 446 3 Ban 564

on the same principle if the Servant lands goods that are dutiable before the duties are paid or sureties given for payment the Servant is liable – Croh Jac 265 10 Mod 109

But no action will lie against the Servant for every breach of orders if no damage is sustained nor for insolence or misbehaviour – there however are good grounds for Correction 1 Sid 278 3 Ban 564 –

But if damage ensues in Consequence of disobedience the Servant is liable 1 Lev 188

1 Sid 278 Mod 248 Keble 2 of 88 –

The same Rule applies in Case of neglect

2 Wil 325 1 Ban 2060 E Dig 617

There is an implied Contract that the Servant shall act with dilligence and fidelity for the Breach of which he is liable – but if he fails for want of skill in doing what

he is commanded he is not liable —

10 Mod 109 3 Bac 564 —

Suppose a Mechanic employs a Journeyman and gives him wages all necessary skill is will be presumed to be exercised by him in his profession — when a Breach of such implied agreement Mr Gould thinks the Journeyman would be liable to his Master or employer — But the Servant is not liable for his Masters Goods lost by Robbery — unless wilfully exposed by him 4 Coke 84 —

The Servant is not liable for the loss occasioned by inevitable accident or by lightning

10 Mod Page 109

If the Misconduct of the Servant has subjected the Master to a loss the Servant is liable to the Master, Str 1083 10 Mod 109

This Rule does not ably when the Master is actually a party with the wrong doer, in this Case they are Joint, Tort feasors in Trespass each joint Tort is liable for the whole wrong — one Trespasser Cannot maintain an action against his ~~joint~~ Cotrespasser for his

Proportion of the damage Recovered. This is Rule of Policy ex maleficio non oritur actio

Hardres 164 8 Mod 186 Kirby 116 —

of the Masters Authority over his Servant

The Master has a Right to Chastise his Servant for breach or neglect of duty as for disobedience, insolence or ill manners persisted in. This Right is necessarily incident to the Relation. No action can in these Cases be maintained against the Servant —

Hawk 111-130 Croke Car 199 1 Sid 175-177 1 Vent 90- 1 Bac 128 —

This Correction must be Reasonable - This Rule also obtains between School Masters & Scholars 2 Mod 167 - 8 Mod 120 -

Mr Gould thinks this Rule relative a Masters Correcting his Servants extends to those belonging to his family and under his personal Control - As Slaves. Menial Servants Apprentices and perhaps to Servants hired by the Year - (tho this is doubtful) it does not extend to all that live in the family as Boarders &c - in Connection a Master

may Correct his Poor subtor Apigned in Servi
But tho the Master has a Right to Correct yet
if he beats a Servent of full age other than
Slaves (Menial Servants) & Apprentices 'tis good
cause of Actation — Mr Gould thinks this Can-
not Apply to Menials tho it may to Labour
-ers by the day, Month or Year — 1 B.C. 428 Fitz
N. B. 168 ——

This Correction must be Reasonable. hence
it is said a Master Cannot Justify a woun
-ding - a distinction exists between a woun
ding and a Battery - any hurt is a Batt
-ery but not a wounding — wounding
always means a Laceration or hurt that
Causes a Contusion and whatsoever by the Ma
-ster is deemed unreasonable - hence it is an
Action of Assault against the Master if he
Pleads a wounding for disobedience. 'tis no de
-fence - he should Plead the General Issue as
to the wounding and then a Battery may
be Justified by Plea of disobedience

2 Mod 164 - 8 Co 120 - 230 - 218 -

By the Statute 4 & 5 Anne when the Master is assa

for beating his Servant he is allowed to Plead do
=able (ie) not Guilty to the whole and Justify
as to part of the Trespass —

When the Master would Justify for beating
his Servent - he must state the Retainer in
the Contract to shew that he is his Servant
- The place where and the time when & the
busines he was employed in - all these bei
=ng Issuable 1 Lid 174 —

The Master cannot delegate his authority to Cor
=rect because it is found on Personal Trust
9 Coke 76 L Ray 310 - G2 Croke Jac 360 Str 953
If the Master in correcting his Servant kills
him, he is Guilty of excusable Homicide
Murder, or Manslaughter according to the
circumstances of the Case 1 Hale 454-473-1
Hard R. 111 Kuligys 65 - 5 Mod 287 —

As the Servant may in many cases plead
himself in his Masters stead as will be
shewn hereafter - it is a Rule that the Ser
vant cannot avoid any deed given to a
third Person By Plea of Duress of the Mast
=er as if it be a deed to Release the Master

from prison it cannot be avoided by Plea of
Dures of the Master - 1 Rle 687. 3 Bac 568 -
The Masters Remedy for injuries done to the
Servant by which he sustains a loss or dam
ages - in general the Master can Recover for
any tortious act done to the Servant by wh
ich he sustains a loss - hence if one entices
away a Servant the Master may have his
action for loss of service - the action being
laid with a per quod it is an action on
the Case and the per quod is the gist of
the action - Cowp 54 - 6 Mod 182 - 3 Vinn 20
Salk 380 L. Ray 116 1 Wood 469 -
If ones Servant is taken away by force the
Master may maintain an action of Trespass
with a per quod alledging Special dama
-ges L. Ray 1032 Sal 380 - 197 - 2 T. Rep 167 -
If a Servant without entitlement leaves
his Masters Service and is employed by anoth
-er knowing of this former Retainer an action
for loss of Service will lie against the latter
Master - But in this Case the Plaintiff m
ust show that the Defts did know of a former

Retainer — See second of Lev 63 - Nov. 10 - 106 —
It is now settled that an indictment will
not lie against one for entising away
the Servant of another unless there is a Forci
= ble taking — Salk 380 L. Ray 1116 3 Salk. 191 —
If a Servant is beaten he alone can have
an action for the Battery (i.e.) the Servant.
The injury is a Personal one and the Master
has no Right to the action but if a loss of
Service ensues the Master may sue for this
Item in this case a Recovery by one is not
a Bar to the ~~other~~ suit of the other 9 Coke 113
10 do. 131 2 Bulst 198 - 1 Lia 145 —
But the Master must declare with a per
quod or the Declaration will be Demur
= rable. loss of Service too must be actuall
y Proved Croke Jac 618 9 Co 113 - 2 Roll 682
1. B. C. 429 — A minor Child is a Ser
vant under these Rules - and an Adult
Child as the Case may be - a Minor is of
Course the Servant of his Father - as the
Father is bound to Support and educate him
so he has a Right to his Service while a

minor - if such Minor has been beaten him
=ay Recover for loss of Service not on the
Relation of Parent and Child but on that
of Master and Servant - on this principle
le one may have an action for debau
=ching his daughter - This action arises al
-so out the Relation of Master and Servant
and not of Parent & Child - Loss of Servic
must be alledged as the ground of the Action
but this is not the only ground of damage
another is the Relation of Parent & Child
The Parent in this Case Recovering as well
for the injury done his feelings as for
the injury he sustains by loss of Servic
If one beats the Servant of another so
that he dies the Master has no Remedy
for the Civil injury is merged in the
Public Wrong - and as Person and Property
are both forfeited to the Public there is no
thing left to Satisfy the Private injury -
But in Connecticut where Property is not
forfeited if any thing is left the Master
Can obtain Recompence - Tyler 89. Tom Rep 339 - 2 Roll
586 -

If a Surgeon injures the wound of a Servant in attempting to cure it and the Master loses his Services thereby - he may have his action against the Surgeon Per quod servitium amisit - 1 Rolle 98 - 2 Burr 332. 3 Burr 568

But says Mr Gould I find it now laid down here that if the injury was occasioned by the negligence or unskilfulness of the Surgeon, that the Master may have his action Per quod &c - The Rule is if he wilfully injures &c &c - I therefore think that the Master can't sue, but that the Servant may

E. Dig. 610 L. Ray 214 - 2 Wilson 359 1 Rolls

X But whether a Recovery merely X

In the case of entertainment and Retainer knowing of the other Retainer Prior to this. a Recovery and full satisfaction had against the Servent is a Bar to an action against Strangers - (ie) the entire &c -

1 B. Rep 384 3 Burr 1345 —

But whether a Recovery merely without satisfaction against the Servant will bar the action against the entire is not settled

the question came before Lord Mansfield in the Court of Kings Bench but was not decided. when there is a Joint and Several Contract a Recovery against without Satisfaction - does not Bar a Suit against the other - But not so in the Case in the Case of Joint Tort feasors a bare Recovery against one Joint Tort feasor is a bar to any action agt. another tho there be no Satisfaction - But the present question is different from either of these the Servant and Master are not Joint & Several obligors nor Joint Tort feasors - the Servant is liable on Contract and the Master in Trespass or the Case - However Mr. Gould thinks a Recovery against the Servant will Bar the action against the Master when there is no satisfaction. It Can't be denied that the Servant participates in the wrong by voluntarily going away But it is he thinks very doubtful whether a Recovery merely against the Master will Bar the action against the Servant -

will damages for the enticement Reheir the damages for the Breach of Contract between the Master and Servant? - It seems probable from that damages for breach of Contract would Repair the damages for enticing the Servant away, and from this Consideration it would seem Reasonable to Suppose that a Recovery against the Stranger would not bar the action against the Servant - But perhaps that nominal damages would be Recovered this being left to the jury. ——

As to the acts they may Justify in each of the offences (i.e) Master and Servant At Com. Law it is an offence called Maintainance for one to abet or assist another in maintaining a action - But the Master may assist the Servant thus and the Servant the Master on account of the Relation between them ——

1. B.C. 429 2 Roll 115

A Servant may also Justify a Battery in defence of his Master and may use the

the same Case in his defence that the Mas
ter would have used — for he puts himself
in his Masters Place — {Salk 407 2 Rol 546
{1 B. & 429

But the Servant Cannot Justify a Battery
in defence of his Masters Son or daughter
or the Servant for he is a Stranger as to them
and as such Can only prevent a breach
of the Peace. But he may perhaps in defe
=nce of his Masters wife tho not of his
Goods — his Right or duty extends only
to the Masters Person 1481-1461

Whether a Master may Justify a Battery
in defence of his Servant is uncertain
'tis said in favour of the Negative that the
Master has his Remedy for loss of Servic
=es by Action — This Reason says Mr
Gould is very unsatisfactory — what if
the wrong doer is unable to Refund da
mages — the Servants service is a Right
the Master has an immediate Property in
it — Any man may Justify a Battery
in defence of his Goods or he may have

an action of Trespass and because he may have Trespass is no Reason why he may not Justify a Battery in defence of his Go=ods – therefore it ought not to Apply in Case of Battery in defence of his Servan=t – the better opinion seems to be that the Master may Justify a Battery in defe=nce of his Servant – Lord Ray 62 Salk 407

2 Roll r 546. Laws in B.C. 124 – 1. B.C. 129 –

Baron and Feme

The Right which the Husband acquires to the Personal property of the wife 1st as to that of Possession and 2d his Choses in action 1st the personal Property of the wife in her Possession is her money furniture &c - the Husband at the time of Marriage acquires an absolute title to all she has, it is absolutely transfered the moment she is Married at the death of the Husband vests in his Executor and not in the wife and this by operation of Law

{Coke Lit 311 - 1. B 259

It is peculiar to this transfer that it tends to defraud Creditors it may operate injuriously to them and they have no Relief It may be asked how this can happen when the Husband is liable for the debts of the wife - Now the Husbands liability continues no longer than during Coverture hence if the Husband pays not the debts of the wife before her death the Creditor cannot recover it of the Husband —

If the Husband dies before he pays the debt the Creditor cannot Recover it of his Administration, but he can in the last case provided the wife has property that did not vest in the Husband (i.e.) if the Husband dies first it Remains her debt —

The Husbands liability to pay the debts of the wife does not depend upon his Receiving Property by her — for he is liable whether he does or not — The Husband is never Considered a debtor to Pay his wifes debts for if he was he would be liable to pay them after his death (i.e.) his Executors would. But the wife is Considered as the debtor and therefore the debt survives against her at her Husbands death — It may be asked then how the Husband is to be Sued at all — the Husband must be Sued with the wife if the debt is Contracted before marriage — Now the ground of this is the wife being Debtor she must be Sued But by Marriage She is deprived of her property therefore if a Suit was Comm

=ment against her alone ~~She~~ Judgment
must go against her alone and She be im
=prisoned 'till her Husband pay the debt
and when he you cannot Imprison one
without the other for the debt of the wife
neither can set the one at liberty with
out the other —

2ly Choses in action - are Notes, Bonds da
=mages, debts &c As it Respects the Hu
sbands title To those belonging to the wife
his Power to dispose of them is in this
case as great as in the former. But
if he never exercises his Right To Reduce
them to personal property in Possession
they will go on his decease to her or
her Personal Representatives — P. Ch 209
1 Roll 342 Moor 45 — 2 or 3 Mod 136 2 Ch. 428
1 Str 25 —

There was a question made when the Hu
=sbands empowered another To collect their
Choses and before the money came into the
hands of the Husband She died to whom the mo
ney belonged — The Court said they were Reco
=ver

to Possession for the Husband as agent took Recov
=ed the Money, & that was a Possession suffi
cient for the Husband - If the wife die
first then Chose go to the Husband as Ex
=ecutor and not as his own Property - the
Husband may assign these Chose in acti
=on and the assignment is valid it must
be however for a valuable Consideration
2 Atk 204-417-1 Bro C Cas 444 & 44
If the Husband does not dispose of his wifs
Chose in action during Coverture he
never can do it When he dies they will
Revert to her or her Personal Representt
ative - This is now altered in England
by Statute there is a Rule in Equity that
the Husband is Considered as the purchaser
of his wifes Chose if he has made a Rea
sonable Settlement on her before Marria
ge but this Settlement has nothing
to do with Jointure which comes in
lieu of dower it may be in either
Personal or Real Property - 2 Vez 401 Eth
& 168. P Ch 763-312-412 - 3 C. Wms 199 Va 301-64 -

If the wife has money in the hands of Tru
=stees the Husband in order to obtain it
must make a decent provision for her
out of that or some other money way
or have her Come into Court and fairly
waive all Claim of such Provision and
a Court of Chancery will grant him the
money — 3 P. Wms 202 - 12 - 640 Vin 179 - 579 -
If the Husband Comes for the Infancy only the Cou
=rt exercis a discretionary Power
{ 3 Atk 21 -
If the Husband become a Bankrupt before he
Receive his wifes fortune the assignees sh
all not Recive it without making
some Provision for the wife — 1 Vern 7 - 1 P. W
{ 382 2 Atk 420 —
If the Husband had assigned the Chose for a va
=luable Consideration it seems that Equity
would not Compell the Assignees to make
the above provision for the wife - 1 Vern. 7
If the Husband is willing to transfer the
Chose in action to the Husband the Court
of Chancery will never interfere and

And if the Husband has a legal title he may obtain the Choses without making Provision — 2 Atk 240 2 P Wms 639 3d ed 112 Atk 67

{640

If the wife die before her Husband her Choses go to her Personal Administrator or Representatives to Pay her debts, by the Common Law the Surplus Remaining after the husband has paid her debts who is her administrator by Right goes to her Representatives But in England by Stat. Car 29 the Husband is not obliged to account for the Surplus it is his own — it follows then that in such States where there is no such Statute the Com Law Rule governs in Connt. we have no such Statute in York State there is one the Husband has the same Right as to his Equitable Choses as to his Legal ones — 4 Co 51 — 1 Roll 910 1 Ld 407 Moor 881 1 P Wms 348 3 Atk 526 1 Ver 15 1 Wms 168

For an Historical account of those Persons who are permitted to administer upon Estates see 1 Reeve Hist of E. Law p 309. 10 - 2d ed 71 5 T R 1 Moor 866 Hob 83 - 191 —

The Husbands rights to Judgment in the right of his wife and himself — If the Husband die before such Judgment is collected it belongs to the wife and so vice versa — 1 Mod 178 - 3 Lev 189 1 Lutw 337 -
The reason why it accrues to the wife is obvious for such Judgment is still a Chose in action until collected* but it goes to the Husband by Right of Survivorship as a Joint Judgment it being a kind of Joint tenancy, the Jus accrescendi would account for it in England but in this Country the Jus accrescendi is in most of the States excluded totally by Statute or usage which last is the Case in the State of Conn.
If the wife has an annuity for life the Husband can Release it only for his life or during Coverture, the ground is this an annuity is not Personal but Real Property. it is an incorporal Hereditament Moor 122 -

* See 1 Swift Page 196

The Husbands Right to the wifes Chattels Real — By the term Chattels Real is meant in this Country a lease for yrs in England it is more extensive a Chattels Real belonging to the wife may be taken in Execution for the debts of the wife during Coverture & set off to the use of the Creditors for any time during the term. The title of the Husband is here hampered to the Condition Co. Lit. 351 - 300 - 461 - 1 Roll 311 - 360

{ 7 Term Rep 632

The Husband is entitled to the avails arising from the Improvement of your Chattels and if he dies first it Returns to him - 3. P. Will 197 —

If the wife dies first it goes to him not as Trustee but absolutely

{ 1 Roll 340 - 11 Rep. Ch. J. 318 - 418 - 1 Ver
{ 270 1 Roll. 345 - 1 Wms 3. 538 —

If the Chattel was Mortgaged the Right of Redemption lies in the husband when the wife dies first Hob: 8 Wood 263 —

Thus it to be observed the resemblance be
tween the wifes Choses & Chattels Real
is this he has the absolute Power over
and disposal of both, If she dies the Hus
=band living they accrue to him in one
case as administrator in the other as
Husband - But if he dies first they
go to her in both Cases Neither however
are liable on the death of the wife for her
debts - No satisfactory Reason for this appears to have been given but it seems to
be positive Law altho it has been said
in England that he takes it as Joint
tenant. Yet this Reason Cannot be ap
=plied in this Country - to constitute a
good Joint tenancy, the Title must
begin at one and the same time, they
must hold by the same Right, it must be
created by the act of the Parties and can
never arise from the operation of Law
This is not so in leases, this reason is the
most fallacious, "ita lex scripta est." the
only one that can be given, The Husband can
=not

Devise away the Chattels Real of the wife. tho'
a lease of them to commence after his Death
would be good — { Cro Eliz. 287. 1 Roll 344
1 Com. 515 —

The Husband may have the Wifes Term and
if he should die the rents would go to his
Executors. tho' the wife would have the re-
-version. the reason is that reversion in
case of fee But mere in case of Chattels
Real. Cro Eliz. 287 Popham 5 Moor 395 or 395
Co Lit 351 1 Roll. Ab. 344-6 Plow 418 Per in Chy
418 — 1 Roll 346 ——

When a Feme sole has the fee of Chattels Real
but at the time of Marriage is disseized
and her Husband does not obtain Posse-
-ssion during Coverture or his Death they
shall go to her or to her Representatives —
So likewise the wife before Marriage. as Ex-
-ecutrix may have Possessed Chattels Real
and yet the Husband gain nothing by the
Possession. Cok Litt 351-2 Show 282 — 2 Atk 84
420 1 do 92. 2 P. will 639 3 do 11 Brown C. in Chy
} = 267

What Interest the Husband acquires in the Real Property of his wife — By Marriage the Husband acquires the Usufruct of all his wifes Real Estate during Coverture whether it be in fee simple fee tail or for life — After Marriage the wife has no Interest in the Estate but the fee if it remains in her — If an injury is done to the Inheritance she must Join with her Husband in the suit against the wrong doer (s) if waste be Committed she must Join. but if the injury Committed be only to the use (s) to the Crops she is not Joined { Coke Litt 351-1B 286 / Lid 11 —

If the Husband die before the wife She becomes sole owner of the Land - Emblements however growing on the Land at the time of his death are Personal Property and go to his Executor — If the wife die first the Real Estate descends to her Heirs and the Husband has no further Interest in it at all — These are the Husband's Rights by marriage

-mudy — But beyond this he may have an Interest called an Estate by the Courtesy To entitle him to this he must have Child born alive who would have inherited the Estate - the wife too must have been actually seized - 2. B.C. 127 —

The Husband will Hold by Courtesy during his life, at his death it will go to his wifes Heirs, By the Tenure of Gavel Kind 'tis not necessary to have a Child born to entitle the Husband to the Estate by the Courtesy. And as our Tenure in Common is Gavel Kind upon the Charter a question might have arisen whether the Husband could not hold this Estate without having a Child born — But the Com. Law has always prevailed & is now established. It was formerly a question whether a man could be Tenant by the Courtesy in a Trust Estate given to the use of his wife. it is now settled in the affirmative — 1 Vern 298. Perkins 437 - 1 Dyn 91-89-30 Will 329 - 3 Atk 691 - 2 Ves 44 - 1 Ves 604 —

If the wife ~~xxxx~~ sola has leased the Lands the Husband can have nothing but the Rent and on his death the Rent in arrear goes to his Executors (ie) the rent arising during Coverture - that which arose before Coverture like all Choses goes to him - This is the Rule of the Com. Law in England - By Stat of Henry 8th it is given to the Husband - 1. Rol a. 345-2 Rent accruing out of the wifes Property during Coverture goes to the Survivor Hom 692 - 1 Rol 348 - 2 B 14 - 4 Coke 51 —

The Intent of the wife in the Husbands Personal Property - It Consist 1st of her Paraphernalia - 2nd Dower 3d Jointure - the wife may gain by marriage, when the Husband dies intestate she is entitled to one third part of the Personal property after the ~~the~~ this Debts are Paid & in Case there is no Issue to one half - The Husband however may devise it away - This right of the wife Comes ~~by~~ from the English Statute of Distribution consists of two Kinds which cannot be Devised away 1st her bedding and Clothing - 2nd

her ornaments the first is absolutely hers and is not considered as his Estate at all She can hold however only a suitable number of the articles that compose it Roll 911 Cow 548 - Mon 213 - 216 - 2 B.M. 644 —

The 2nd Kind cannot be devised away tho in deficiency of Personal Property the wifes ornaments are to be taken to pay the Husbands debts by the Executor and the Husband may take them away during Coverture 3 Atk 370 - 395 - 2 Ves 217. 44 - Esp 5 78 - 1 P. Will Rep 730 -

If the Husband Pledges the wifes Jewels and dies She shall have the aid of his personal property to redeem them and be put and before Legatees for this purpose 3 Atk 395

If Lands are devised to pay debts in case her Jewels are Pledged She stands a Creditor and may combine a Sale of them in this She is inferior to Creditors but Superior to volunteers - 3 P. Wms 80 1 or 80 - 1 Ves 729 - 30

2 Ves - 544 - 1 Atk 369 - 2 Ves - 104 — —

In most of the States the Personal Property must be used first & then the Real for the

payment of debts, It seems therefore that the Paraphernalia cannot be touched till both be exausted — By dower the wife becomes entitled to one third part of all her Husbands Real Estate of which he was Possessed during Coverture and at his death. of this he cannot deprive her by will or conveyance unless she Join in the Conveyance. 2 B. 139. 10 Co 49 - 2 Inst 349 Noord 575

It is not necessary that there should be an actual seisin of the Husband to entitle the wife to dower a Right to Legal Seisin is Sufficient it Must such an Estate too that her Issue if she has any may inherit it tho it is not necessary that she should have Issue as in Courtesy the wife of an Idiot Cannot be endowed 2 B.C 139 - Coke Litt 31 —

She must have been his actual wife at his death — 2. B.C 130 Co. Litt 31 —

Executors cannot touch the dower or if they do with the wifes Right of use for life at his death it will go to them —

Between the wifes Right to personal and
Real Property there is thereon this differnce
She holds Personal Property absolutely Real
Estate she holds for Life only. the first may
be taken for debts, the dower cannot —
By the Com. Law the Heir was obliged to ap
-ign the widow her dower at a certain
period after the Husbands death which if
he neglects he may be compelled to do
The Statute in different States has made
some small variation —
This Estate in dower may be Barred sev
-eral ways - 1st by the Husbands being an
Alien Now an alien can own no land
the wife therefore can have no legal tit
-le to property when the Husband holds
only by sufferance — 2nd by an Elopement
of the wife with an Adultrer. it may
be Restored however if the Husband after
wards Revives and treats her as his wife
Coke Litt 37 - 4 Co 12 -
3d By a Settlement of a Jointure by the
Husband on the wife — to defeat dower

the Jointure must be Settled upon her before Marriage, that she be not under her Husbands Coertion. She must agree that it is in stead of dower. It must consist of Real Property. It must fall to her immediately on the death of her Husband It must be a compleate Freehold, and in general Proportioned to his Property and her Rank. It must be Conveyed to her and not to Trustees for her use —

{1 Atk 561

If the wife makes a bad Bargain as to her Jointure the Court upon application from the wife will Rescind the Contract and give her her Dower notwithstanding the General Rule in Cases of Contracts for the wife at the time of Marriage is not Considered in a situation to make a good Contract Bargain — It must express in the Jointure that it is in lieu of dower or it will be Considered as a Marriage settlement which is no Bar to dower. Jointure may be Settled after Marriage and be

effidavous (and) in consequence of an agreem
=ent before Marriage - If Settled without su
=ch agreement the wife may Choose betw
=een Settlement and Jointure. She cannot
have both - formerly the wife was endo
=wed at ostium ecclesia with Personal
Property which she held absolutely - When
the Husband gives his wife Property by will
she is not obliged to accept it but if she
does it bars her dower - Equity Cases t 218
2 Ves 361 - 3 Atk 430 - 4 Co. 4 - Co Litt 36 -
A practice has prevailed in some of the St
ates of Construing a will made by the
Husband in which without any qual
=ifying words he gives his wife one third
part of his Real Estate to be in lieu of do
=wer for the Law will not presume that
by such a vague expression the Husband
meant his wife should should have not
only one third but the dower also - L. Ray
438 Crok Eliz. 128 - - -
If the a Bond is given in trust for the supp
ort of the wife - she may Choose between

the Bonds and her dower 3 Atk 8 — A Mortga
-ge of the Husbands unless Joined by the wi
-fe will not affect her dower. She may
Redeem — — Pre in Ch 7. 137 —
If the Husbands Estate was Mortgaged before
Marriage the wife must Redeem before she
is entitled to dower and when the Heir pays his
part of the Redemption money he need not
pay the Interest because she has used and
reaped the Profits If Lands settled on the
wife as a Jointure are Mortgaged during
the Husbands life time she may abandon
her Jointure and Claim dower or Redeem
A wife cannot be endowed of an Equ
ity of Redemption for it is a personal
Chattel and may be devised — This has been
denied. 1 Atk 606 — 1 Cha Ca 271 — But this deci
-sion has been over Ruled 2 Will 212
The wife of the Mortgagee can never be
endowed with the Mortgaged Premises
Hard 465 — 6 Cro. Car. 190 —
Right of the Husband to Personal Property ac
-cruing to the wife during Coverture, as legacies

Notes &c— It is contended on the one hand that the Husband acquires an absolute property in them — on the other that it is in the same situation as Choses in action belonging to the wife before Marriage — there are many Authorities in support of both these opinions The former appears to be Correct for it is acknowledged on all hands that the Husband may Institute a Suit or action in his own name to Recover such Choses as accrue to the wife during Coverture which cannot be done to Recover Choses due before the Marriage — She must be Joined and besides this the Symetry of the Law is better preserved in this way than in the other — the authorities in support of this case are 1 Com. dig 444 and Cases there cited Contra 2. P. Wms 449 —

The Husbands Right to damages for injuries done to the wife before and after Coverture such as beating her & Slandering her reputation &c — — The Husband is intitled to all damages arising from injuries done to the wife before

Marriage - he holds them absolutely if Collected during Coverture if not they survive to his wife at his death — So if damage is done during Coverture the Case is the same if he sue he must be Joined with his wife 4 Lyle 89. 1 Roll 760 - Cro Jac 501

(536. Cro. Car 90 1 Salk 119-206 1 Brown Law 205

The Husband besides this is entitled to another action in his own name for the damage he sustained in the loss of the wifes Company & Service - This is an action of Trespass per quod Consortium amisit any expence he may have been at is included - In the same Case he may have an action against the wifes Slander for this may work him an injury as in Case he is an Innkeeper - 1 Salk 206 1 Lev 240 1 Lid 346 - Cro Jac 501 2 Roll 566

Stange 949 - — — —

The Husband has a right to the Servant of his wife if therefore any one Carries her away he may Commence an action for the Injury sustained the injuript to the Husband

and his Remedy for Crim. Con. with his wife. The form of the action is Trespass vi et armis but the substance an action on the Case for the seduction of the wife It was formerly but it is not now supp and that the facts being proved a Recovery must be had - If the Husband be accessary to the Crime he shall not recover for no one can take advantage of his own Wrong. Wms Ab. 182-4 T. Rep 651-5 do 367

In this Case the Marriage must be proved not by Reputation but by Eye witness or the Register 4 Burr 2057-1 B. Rep 632 B.N.P. 28 - 4 T. Rep — Bunt & Barlow in Douglas

After Separation and Written articles of agreement this action will not lie 1 Wms Ab. 182-3-4 B.N.P. 94 - 4 T. Rep 651 - 5 do 367

The culpable negligence of the Husband the bad Character of the wife and every like Circumstance of the Husbands neglect of the wife will tend to lighten the damages — —

The Power of the Husband over the person of his wife

one he had the same Power over her he had over his Slaves. but since the Reign of Charles 2nd (a time which ought to be Hailed by wives as a glorious Era) wives have been treated tirannly - The lower Class of Citizens (ie Brutes in disguise) Claim the right of Chastising their wives. the Laws of Connecticut Recognize no such Right (This is common sense taken by the fou toh - R. Hunt)

The Right of finding Sureties for Good Behaviour —— an action hes lies on both sides in Case of violent (abus) thr=eatning on Complaint being made by the agrieved party to a Justice of the Pea=ce he will if he see Cause have the off=ender bound over on Sureties for his or her good behaviour - 1 Lil 113 - 1 Dan 285 2 Lil 128 — It has been said if the wife leave the Husband without Cause he may seize her and force her back again it is also said that the Husband may instruct the wife to hinder her from going

away with an adultress — Strange 875-478
1207- 3 Burr 1622 Hawk 130 Mod 875- 2 Lid 128
4 Burr 1991
The Law will not compel her to Leave her
friends if she fled from her Husband arbi
-trarily 1 Lid 113 Mund 130- Bac 634 Abr 1207
The Husbands liability to pay debts of the
wife Contracted before Marriage — —
The Husbands Liability does not upon his
Receiving Property with the wife but up
on her having none while under Coverture
and other reasons already given 1. Roll
31-1- 3 Mod 186- 3 P Wms 409 East 366 -
When a feme sole is sued and then Marri
ed while the Suit is pending Judgment
will go against her in her Maiden name
and she may be taken & Committed to Pri
-son 2 Abr 1167- 1272- 1 Wils 124- Burr 96
2 B. Rep 720 — —
The Execution must be Issued against Hus
band and wife and if he absconds she
must be discharged 1 Lid 391- 1 Vent 171
If the wife dies before Judgement is ob
-tained

for a debt due by her before her Coverture the Husband is discharged if he dies first it survives against her-Cro. Car 366 1. Bac. 307 - 7 Jn Rep 348 - Esh 122 - 1 Dur 293 1 Lid 337 - 3 Mod 186 Carth. 30 — —

If Judgment is Rendered and the wife dies it may be collected of the Husband! —

The Husbands Liability for the wifes Torts Committed before and after Marriage

The Husband is liable for the Torts of the wife before Marriage on the same ground that he is liable for her debts - Cro Car 301. 1 Bac 307 1 Wilson 341

If the Husband dies before they are Rec over the wife alone is liable - If she should die before they are Collected he is not liable - because Torts are personal injuries and die with the Person - still if the Estate was benefited by this injury he might in some Cases be liable - 1 Lom? 312-1 Roll Ab. a. 6 it varies - as to the Torts Committed after the Marriage they are sued for which both are liable and some for

for which he alone is liable - when the wife Commits a Tort by the Command of her Husband he alone is liable for she is Considered as his own agent - Cro Car 544 184 - 255 - 1 Roll. 348 - Cro Jac 661 -

When the Tort is Committed in Company with another of both she is Excused the ground of this is a supposed Coertion on the part of the Husband - If the wife Commit a Tort without the privity. Consent. order or presence of the Husband then it is her wrong and an action lies against both and if he dies it survives against her - 1 Roll 251 Leon 122 Cro Car 376 - -

The Husbands Liability for the Publick offences of his Wife - -

When the Punishment inflicted is nothing more than a fine the Husband tho Innocent is liable with the wife 1 Hob 65 - 1 Hawk 4 -

But when his imprisonment or Corporal Punishment the wife alone is subject because she has all the means of making

satisfaction Hawk. 3 Had 3-2 Dacon 294
If there are any duties incumbent on the
wife to fulfill upon marriage and by
marriage she becomes incapable thereof
on the Husband must fulfill them if
a man marry a widow having Ch
ildren whom she is bound to support
after Marriage - he is bound to main
tain them - But the case is different
if the woman is a Pauper - Her Chil
dren remain paupers. it is also a
duty incumbent on Children to ma
intain their Parents But a daughter
on her Marriage or at least her Husba
nd is exempted from this duty - The Parents
must go to their other Children - This prin
ciple has been adopted in Connecticut
Strange 198 -
It has been denied in England on Author
ity of the Case in Strange that the Husba
nd is not bound to support the Children
of the wife by a former Husband. 4 T. Rep 118

But Judge Reeve thinks this can not be Law
A Statute of Elizabeth Created the duty of Ch
ildren to Support their parents - There is no
Com. Law to this effect — When he Court
=ion of or in Company with the Husban
d the Wife Commits an offence which is
Malum Prohibitum merely She is excus
d and the Husband is liable - So when the
offence is against Property however attroci
=ous it may be the Husband alone is liable
But this does not extend to actions that
would have been a Crime in a State of Natu
=re or that are so per se as Murder etcetra
, the wife is liable for Treason both are
liable for Keeping a brothel 1. Hale 46-69
1. Hawkins 2-3-
In Felony the wife may be made Accep
ary before the fact - not after Hawk
Hawk at Supra - 4 B.C. 28- - -
That Contracts of the wife are binding on
the Husband - The wife can act as Att
=orney for her Husband therefore if she
makes a Contract under an express

authority from him he is bound by it
qui facit per alium facit per se - The Husband is bound by those Contracts which it was usual for her to make & him to ratify (or by) the principle is presumed & Consent
{1 Lid 128—

She is bound if it be such a Contract as according to the Custom of the Country wives usually make — 1 Roll 351. 1 Lid 120 Strange 345 —

Were she to borrow money the authorities say he would not be liable — In this Country his Honor Judge Rice thinks he would. The Husband is bound for every Contract of his wife for his use and by which he is actually and voluntary benifitted — Particular in the benefit of a Contract from this evidence that he Authorised it 1 Lid 120, 3 East 333 —

If the Husband is insane in a foreign Country or in any other way incapacitated from doing business, the wife may Contract standing precisely in his Place and

he will be bound — 1 Lee 127 —

The Husband is bound for necessaries which she may purchase when he refuses to afford her any — if the Husband drive her out of doors & Publickly forbid all Persons from harbouring or trusting her still he is bound for Necessaries — Salk 118 — Stra 1214 — 6 T. Rep 606 4 Burr 2078

And if she leave him her self with a good reason he is liable for her maintainance tho he forbid all persons trusting her Strange 875

If she go without good cause he is not liable to support her — if she returns he is But if she goes with an Adulteress and then comes back he is not oblige to receive or support her Sal 119 Eshin 125 — 1 Comm 468 — 1 Bac 299 Strange 875 — 6 T. Rep 603 —

If the Husband provides necessaries at home and treats his wife well he has a right to forbid all Persons trusting her 1 Lee 5 — 1 Hid 109 &c &c —

In case of the wife Elopement with an adulteress the Husband is liable
-bility

seems to depend on the notoriety of the fact
It would seem that before the affair was
known he ought to be liable in the same
manner as the Master for his Servant after
dismissal before notice is given to the pu
blic - 1 Stra 647-706-6 T. Rep 603 -
A wife living in adultery is bound by he
r Contracts - (Strong) 1 B. & P. 226 -
If an adultress live with her Husband he is
bound by her Contracts Strange 647-706-6 T. R
603 - 1 N. Rep 226 -
When by mutual agreement the wife has
a seperate maintainance and this is publ
icly known & sufficient to support her the
Husband is not liable for her Contracts even
for necessaries - if the Maintainance is not
sufficient for her he is liable L'd Ray 444, 1006
Sal 116-118 4 Burr 2177 -
For a man in all cases cannot forbid all
persons from trusting his wife for necessaries
he may forbid particular persons from trust
ing her who are his enemies - 1 Mod 171 - 2 Show
83 " " "

It is said that if the wife buys Goods and sells them again or Pawns them the Husband is not liable — 1 Salk Reid 118 —

I see Reason cannot account for this exemption on any other ground than this. They must Come to his use to make him liable — But his liability Commenced at the time of the Purchase and how Can any after Consent of the wife discharge him If the wife without a Special Power of Attorney give a deed even for necessaries it is void — the Husband is still however liable for necessaries in Assumpsit —

{6 T. Rep 176 —

A Contract for money loaned to buy necessaries with will not bind the Husband in a Court of Law but will in a Court of Equity — It ought to in Law 1 Salk 287 — 10 Mod 483

5-5-9

If the wife is Committed to prison for a Crime for which she alone is liable the Husband is not bound to furnish her with necessaries — 1 Mod 128 — 2 Vent 155 — 1 Lev 44 — 1 Salk 386 — 2 Lev 16 Stra 1122 —

of Debts due from and to the wife at the time of Marriage - Upon the Marriage all debts due from the Husband to the wife are discharged - 1 B.C 442. Cro Car 551 -

If after his death a bond or Note is found in favor of the wife against him it survives against his Executors Gould. says it would not survive a personal Contract on a is forever discharged. extinguished, 2 H. Blac. 10 - 1 B.C 442 Cro Car 551 -

Debts not to be paid 'til after his death

Agreements entered into before marriage for her support in case of his death. are binding both in Law and Equity Holt 216 Lord Ra. 515-550 Com Dig 67 Car 512. 2 Vent 480 1 T. Rep 318 or 381. 3 ac 331 Sal 325 -

Contracts as to Real Property between the Husband and wife, a Conveyance of Real Property by a man to his intended wife is binding - It is a maxim of the Com. Law that Husband & wife cannot contract togeth er after Marriage as they are considered as one Person in Law - This is true as to person

al

property but false as to Real, for a Devise of Lands does not vest in him but in her in obedience to this maxim of Com. Law they could not Convey to one another - It is now Settled that the wife cannot convey Lands to her Husband during Coverture - Coke Litt 112 - 187 so formerly the Husband could not Convey to the wife - But a plan was contrived to avoid this - for the Husband Conveyed to a third Person and he to the wife - this was allowable - But in England the Statute of Uses enables the wife by a species of fine to convey Lands directly from the Husband - - Here A. the Husband Conveys to B. a third Person for the use of the wife then the title without any act vests in her Coke Litt 112 - 2 Roll 188 Rawe 111 Dyer 106 - In Cons. we have no such Statute and pursue the old Common method - The Husband cannot Contract with the wife as it Respects personal Property This Rule is universal in a Court of Law But in Equity an agreement on the part

of the Husband that the wife of the Marri
-age Shall have Certain articles and the pro
-fits of the Sale of them is binding and in
some Cases she has been Considered as a Cre
-ditor to the Estate from having loaned mo
ney so acquired to the Husband. But a
voluntary promise of the Husband that
at some future time he will allow the
wife such privilege is not binding
either in Law or Equity -

of Articles of Seperation - - - !!! -

Agreements of this nature are allowed in
England both in Law & Equity and the pa
-rties are bound by all the Legal Contracts
Contained in them

By Seperation the Husband may renounce
all his material Rights - as far as he does
renounce them he Can never Reclaim them
If they agree to live Seperate and nothing
more he loses all Right to her Person
If he Covenant to Support her he is bound
to by it - but if a Legacy should be left
to her it would come to him, and Leases

that descend to her he would be entitled to the use - But if he Covenants to renounce all Property he will be bound by it - Nothing is implication all must be expressed - He Can sue for no injury done to her nor for Crim. Con. nor can seize her Person - Contra 6 East 244 -

If he renounce all Right to her property she can convey her Real Property in her own name & this by fine and Recovery - Stra 478 2 Atk 511 Comber v Hudiston in 16 Blac. & Mod 22 Burr on Bust 432 - 1 Ves Jr in Ch. 614. 496 - 2 Ves 386 3 B.C. Ch. 614 -

If the Husband agree previous to Separation to support the wife - if Separation be accompanied he is bound to do it after Separation on the grounds and Conditions stipulated or Reputed - The wife is Considered as a feme sole only as to marrying again - B.C 384 - 2 Vent 214 - 2 East 283 . 2 Ves 671 -

After Separation the articles Cannot be Changed or annulled but by mutual Consent The wife is in prison to the Creditors in point of obtaining a Separate maintainance for a

man must be Just before he is generous — 2 Ves 366 P. in Ch. 497 — Stra 478 - 2 Atk 511 - 3 ao 547 - 2 B. Ch Ca 90 — 2 or 3 ao 614 — " "

Contracts by which Wife may bind herself !!

It is a General Rule that the wife Cannot Contract so as to bind herself — But when she does not act under the Coertion of her Husband and his Marital rights are not effected by it she may make a Contract which is binding on her — The exceptions are 1st when he is banished the Realm She is then free from Coertion and his Marital Rights are not effected by her Contracts and then She may make a Contract binding on herself — Coke Litt 133 Roll 400 - Moor 506 'Tis said in this Case he is Civiliter Mortuus but it is not so for She Cannot Marry to another while he lives

2nd when he abjures the Realm She Can bind herself by her Contracts - So also the wife of an alien may bind herself by her Contracts on the same Ground — Sal 116 - 2 Eds 646 - Comb 402 L. R. 147 Bro C. C. 308 —

3d When the Husband is banished for seven years only She may bind herself by her Contracts
The above exceptions are universally admitted — 1 Vesy 305 — 2 Vesy 145 —
A Wife living on a Special Maintenance can bind her self She is here beyond his Control and his Marital Rights are not effected by her Contract. 15. Rep 5 Case of Baron Palmity — This has been overruled in one Case if the Court found their division on the Ground of a Separate Maintenance and it seems they did — In opposition to the Case of Palmity (Polemitz) see 2. H6. Blac Rep 1079 Hutch v Buttle — here was no Covenant to live separately next Case H6. B. Rep 1095 Lee v Scott here was no Covenant to prevent his Reclaiming his wife and putting an end to the Temporary Separation —
4 T Rep 766 No Covenant — 5 T Rep 676 No Covenant Ellis v L — 6 T Rep 604 No Cov^t unimportant Case Mrs R — 8 T Rep 445 or 514 — In this Case (According to the Register Sect. 46. 64 and several English Statutes She may on departure of her Husband

be admitted to defend her Lands in Court)
Court intended to overthrow the Barons. Yet
this decision (independant of opinions
no way necessary to be given) does not op
pose the Barons Case - If this Case was de
cided on the ground of a Seperate Maintie
nance and not on that of a Covenan
t it is directly opposed to the Barons
The wife may during Coverture if the
Husband Joins with her in fine or Com
Recovery make a binding Conveyance of
her Lands - Besides this is a Statute of Henry
8th that vests Certain Leases made by her
and her Husband for 21 years and no long
er - We have no such Statute in Conn. In
the U. S. there is no such mode of Convey
ance as by fine and Recovery but here the
wife may Convey her Lands by Joining
in the Com Law Conveyance Brow 33-43
12 Mod 161 - 1 Co 43 - 1 Henry B. 346 - 1 Ver 229 Colia
3 - The Husband and wife are Joined in
a Conveyance where he may Convey the um
and She the fee - - She may Convey alone

if his Rights are not affected by it if he di
sagrees to it the Deed is destroyed but if the
wife dies before he disagrees the deed stan
=ds good — Authorities ut Supra -
It is a Maxim of the Common Law that
a freehold Estate cannot Commence in fu
=ture also that every Remainder must be
Created at the same time the particular Es
tate is on which it is limited - If the wife
therefore should Convey her Lands to Comm
ence at the Cepation of her Husbands in
=terest in them such Conveyance would
be void, because the Real Estate would
be to Commence in future and the part
=icular Estate at the time of her Marriage
such a Conveyance might be made in Con.
for the mayors are here done away; by
Statute The Husband may prevent the wife
from Running Lands by deed
That he may by Descent or Devise there is no
division but the same division exist as
in the Case of deeds prior) that it may
effect his Rights for he may be obliged to

to pay Taxes which in his opinion may ex
-ceed the value of the Land —
A wife Can Execute a Power without her
Husband whether given her before or after
Marriage — 1 H.C.B 346 Latch 39 Perkins
on grants 7 — Wm Jones 134-157-3. Cow 567 Pow
Dev 150-1 Roll 389-2 Mr 75 — — →
No one has ever questioned the right of the
wife to Execute a Sealed Power — hence if the
Legal title to Land is vested in her to Con
vey to a third person She may do it (with
out living) without living Join'd (with her
Husband
Power of the Husband to Convey Land
of the wife — If the Husband Convey the
Real Property of the wife She can of it du
-ring Coverture only will Pass — or if She
have an heir born during Coverture the
Husbands Courtesy will Pass —
The Power of the Wife to waive or Confi
-rm her Contracts entered into during Co
-verture
If an Estate is left to the Wife during Cov
Verture

and the Husband avoids - after his death the wife may avoid or not as She Please - the Contracts of the wife as to Real Property are not void but voidable - It is said that the wife is entitled to the arrearages of Rent incurred during the life time of the Husband after his death, if this is the Case it is on the principle of Joint ownership or Jus - accrescendi - - any Con = tract made by the Husband Concern = ing the wife's Land She may Confirm or annull after his death at Pleasure an affirmation of the Contract may be implied from her Consent - as if She Re = ceive Rent for Land leased by her Husband Roll 349 - Coke Litt 26 -

If the wife owes Rent upon Marriage the Lessor to Recover it during Coverture must Join her and her Husband in the Act = ion but after his death it Survives a = gainst her - for Rent arising during Cov = erture he must Sue the Husband alone if alive if dead his Executor or Administrator

{ Roll. 351 L. Ray 522 -

The wife may lose an Estate by her Husbands
or Negligence - Suppose an Estate is given
to her if the Husband perform such and
such Conditions - Now if he fails she
loses the Estate Coke Litt 246
But when this Condition is annexed by
Law and not by act of the Parties as tak-
ing the oath of Fealty here the wife shall
not suffer by the Husbands negligence
Coke Litt 133-
In What Cases the Wife must Join in a Suit -
When ever the Cause of action would ac-
crue to the wife she must Join 1 Vin 224
3 T. Rep 631 - 1 Bac 304 - - - -
For Choses due the wife before Coverture
for Trespass committed on her Lands be-
fore Coverture, for an Injury done to her
freehold, her Person or Character before
after Coverture a Joint Action must be
Brought - 1 Bulst 21 - 1 Roll A 347 - Cro Eliz
537 - Cro Car 517 - 1 Lev 25 - 1 Brow Cas 201 - Cro Jac
501 - 588 - Cro Car 90 - - - -
The Reason for Joining the wife in these

Case is that what can the Husband Recover is personal Property and belongs exclusively to him - But as they are all Choses in action - If he does not Reduce them to Possession probably during his life they will Survive to the wife after his death Now if he should sue and obtain Judgment in his own name and die it would go to his Executor - Whereas it ought to go to the wife and so is the Law - The proper way is to Join her name and obtain a Joint Judgment & in this Case it Survives to the wife

It is asserted by Elementary writers that the Husband can sue alone upon a Chose in action belonging to his Wife before Coverture and to Support the doctrine have cited the Subjoined Authorities not one of which apply to the Case but merely shew that he can sue for a Chose accruing to the wife during Coverture or Choses may be Joined at Pleasure - 1 Ver 369. 3 Atk 21 2 Ver 66-7 - 2 Mod 217 - 3 Lev 403 - 1 Ver 82 Mly 36

2 Lev 107 - 3 T. R 627 - 1 Ver 676 - 2 Moo 214 - 2 Ver 676

When the Cause of Action does not Survive to the wife She must not be Joined

4 Moo 186 - 1 Salk 114 Cro Jac 77 - 1 Roll 318. 347

3 Lev 403 - 1 Ver 82 Parl Rep 204 - Cro Jac 442

447 - 501 -

In all actions upon Choses belonging to the wife before Coverture She must be Joined

3 Term Reports 627

It is said the Reason why the wife cannot sue alone is that Coverture is a disqualification, but it is not absolutely so as tho She did not exist - for when She is alone for Trespass on her Personal Property before Marriage Coverture cannot be Pleaded in abatement - but was she so disqualified that She had no Right Recognized by Law it might be Pleaded in Bar as well as abatement - 2 Ld Ray 1207 -

Again it is said She cannot Sue alone because she and her Husband are but one Person in Law - but was this true the Husband would never sue for it Requires

one Person at least to make a Plaintiff
But the Substantial Reason is that the De
fendant shall not be vexed with a Suit
by a person who if the Case was lost wo
uld not be able to repunse Costs and a
fine Court would not for she has no
Separate Property —
When a debt accrues to the wife dur
ing Coverture the Husband may either sue
alone or Join his wife with him — 4 Mod
156 — 1 Roll 318 — 1 Lev 403 — 1 Ver 82 Salk 119. 114
Carth 251 — 2 Inst 195
It has been ruled that an action Bro
ght by the Husband & wife for Labour Per
formed by the wife would not lie. The
Court admitted that in an express pro
mise the action would lie. even if Bro
ght Jointly but said the profit of the
wife's Labour would not survive to her
The same might be said of an express
promise and therefore Judge Rules the
rule the action not Law —
It is true as a General Rule that when

the Personal Property of the wife is the me
itorious Cause of the action She may be
Joined in the action with the Husband
1 Vent 162 Cro Jac 205-442-399-438-1 Lid 172
ower 83 - and Judge Rowe
If however in this Case the Cause has occa
sioned no Special damage to the Husba
nd the action may be Joint or not -
provided the Cause of action would not
Survive to her after his Death - And vice versa
If Property of the wife is Invaded by one Con
certor and is Converted after he may Join
1 Bac 396 - 1 Vent 261 - 262
If Joint Judgment is obtained in any
of these Cases and the Husband dies be
fore Collection by the English Law it
goes to the wife — In Con: we have no
such Statute but his honor Judge Rowe
thinks it would here survive to the Wife
1 Ves 396 or 369 —
When must the Husband and wife be
Joined — If the Cause of action would
survive against her they must be Joind

1 Roll A. 348 Coke Litt 351 - 1 Lw 312 —
If the wife before Marriage is a Lepse of
Lands and the Husband neglects to pay
on her Contracts and is sued the wife ma
y not be Joined. for Covenant by Oper
ation of Law is transferred to the Husba
nd — Auth ut Supra —
When an action is Brought against
them both for an Assault and Battery
and the Husband is found not Guilty
Judgment Cannot go against the wife
for if it Could She might be Imprison
ed a thing forbidden in the Law —
If the Husband and Wife are beaten two action
s arise for altho the Husband has an Inter
est in Recovering for the Battery of the wi
fe the Rule does not hold con. vers
1 Vent 32 - Cro Jac 665 See also Com. Dig.
Litt Joinder of Actions

Of the Wifes Power to Devise

By some it has been said that there is an impropriety arising from Coverture, which at Com. Law prevents the wife from disposing of her Personal Property by Will. In some of the States there are Statu giving the Wife Power to Devise - but in those States where there is no Legislative Regulation on the Subject - the question as to what the Com. Law is has become an interesting one -
In Cont: this question is put at rest (tho it has long been agitated) by a late Statute in affirmance of this privilege in the Wife
That the wife could devise personal property with the Husbands consent is established by many & Ancient Authorities Was Book 5 Rep c. 312. 739 Books Dic 34 Cro. Car 219. 376.
It is laid down by Bracton and afterwards by Glanville that the will will of a Wife is generally not good. but this can apply only to her Personal for at that period Real Property could not be devised by any one
1 Reevy Hist 111. 317. 101. 3 ao 9 -

It is next laid down by Arch Bishop Stafford that a Feme Covert may dispose of her Property by will which doctrine is Recognized by the 11th Revers Hist C. L 68.

But the thing which first gained the doubt Concerning the Wife's Devising was that in the early ages when the question arose was that she had no Property to Devise

That the wife may Devise her separate Estate is fully settled - but in England the Stat. Hen. 8th precludes her from the disposal by will of her Real Property - 2 Vern. 190. 718. 303. 1 Vern 214. 2 Ves 752. 2 P. Wms 316. 4 do. 126. 1 Bro C. Pr. Cha. 205 2 Atk. 707. 9

She may also devise her Choses - but still the Husband may Reduce them to Possion and thus destroy such devise - 1 Mod 211-12 - 2 Ansew 340. 1 Roll 608. 912. 214. 2 East 552 -

In Eng. the question whether the Wife might devise her Real Property Could never Come up for the same Stat which first allows the disposing of Real Estate by will. Expressly takes away this privilege from femes Covert - 2. Roll. 315.

when the Wife lives separate from the Husb
and by articles of agreement & the latter
has relinquished all Claim to her Real Pro
=perty. She may surrender to the use of the
will & it will be binding 1 Hen. Bl. 344. 34
9— Since it appears that Coverture
at Com. Law was never considered as a dis
=qualification to devise, for when ever the
Wife Possessed property which was at her ow
n disposal she could devise tho for a long
time she had no other Property than her
Paraphernalia — A Wife may devise
that which She holds in Right of an othe
=r as when she is an Exetrix
The question then which arises in this Count
=ry upon this Subject is whether in those
States in which there is no Statute similar
to the 32 Hen. 8th the Wife can devise her Re
=al Property — Judge Reeve thinks there can be
no doubt but that she can devise both he
Real & Personal Property in all Cases — Prov
ided her Husbands marital Rights are not
affected

Of Marriage, being a Revocation of the Will of the Wife made Prior to Marriage —

That marriage Revokes the will of the Wife made before marriage is the Law laid down by Elementary writers — and this dictum in some instances by Judges

In Eng. it may be necessary that Marriage should Revoke a will made before marriage for thus as a Wife cannot make a devise of her Real Estate it is certain that no will ought in such case to Remain in force after the Power to devise is gone —

4 Coke

It does not seem that Marriage in all Cases will work a Revocation — Yet in some Cases it certainly will — as when Personal Property is devised and Marriage ensues the property is transfered to the Husband of Course cannot go to Devisee —

Of the Wife's Separate Property —

A wife may have Separate property — i.e. property over which she has the absolute Controll it may be either Personal or Real —

Where Real Property was devised to the wife after Coverture it meant for her separate maintainance & use - It was formerly customary to convey it to Trustees for her use the Legal title vesting in them - 3 Atk 695 Russ 187 - 1 Ves 5-18 -

But of late it has become usual to convey it directly to the wife & any words indicative of the devisors intention to that effect will be Sufficient 1. P. W. 124 - 2 do 316. 3 do 334. Atk 399. 2 Vern 619 Brown Law 382 Russ 187 —

A gift of Personal Property from the Husband to the wife has been held to her separate use Burb 225 —

There is no particular form of words necessary to create a separate Property in the wife 2 P. W. 144 - 3 do 38. 2 do 82 - 1 Atk 269 -

Where the wife lets her Husband have Property as her own & locates it as a debt by taking a Bond or Receipt - on his death she shall be considered as a Creditor and Recover from the Estate of the deceased such sum so located — But where she advances money

But when she advances money to the Husba
-nd without any apparent intention of re
-ceiving it again She cannot claim it afte
-r the death of her Husband 2. P. Wms 2. 341
A Wife can alone dispose of her
Personal Property in the hands of trustees
But whether She can of her Real Property
is a point yet unsettled - 1 Vs 452. Pin Ch. 35
The Legal title being in the Cestuy que trust
But 'tis true she can compell him to convey
by taking the proper steps — The Wife is
considered as to her separate Property as a
feme sole & may as it relates to that when
she has a separate maintenance bring an
action against her Husband which must
be done by Prochein-amie —
Of the Settlement of an Estate upon the
Wife by a minor Husband before Marriage
When a minor Husband Settles an Estate upo
-n his wife before marriage the Contract
will be binding upon him. And this is an
Exception to the general Rule that a mino
-r is not bound by his Contract 3. Atk 604

yet it is not to be understood that by such
Contract he is of Course bound. for a Court
of Equity will examine into it & if the
find the Settlement to be an unreasonable
& improvident one they will rescind it
Of Marriage Settlements -
It is a gen.l Rule that no man can
make a voluntary Settlement by which his
Creditors will be affected. And it is imm
aterial whether the Creditors are prior or
subsequent to the grant — But a Marri
age Settlement is made for a good & valuab
-le Consideration - it must be binding
even against Creditors. with this Restri
-ction. (i.e.) it must not be unreason
able ~~that~~ or greater than in such Cases it
is usual to make - the Settlement must
be confined to the wife & Issue of the Mar
-riage - - 2 P. W. 194. Eq Cas. 354 - 3. Rolls
Ab. 6. 1 Vent 193 —
Of Marriage Settlements made after the
Marriage - -
If a Marriage Settlement made after ma
-riage

is made in pursuance of a written agreement entered into before Marriage it is good And so if no Settlement ever made at the time of Marriage. But a reasonable one made out a portion Running by the wife after Marriage is also good -
A Settlement will be good when made out of Property Recd from trustees. 3 Atk. Rs 420 Amb. Rep. 14 -
It is a Gen. Rule that all Settlements made after Marriage unattended by any of the preceding Circumstances are to be considered in no other light than as voluntary grants Pin Ch. 22 Coop 278 1 Br. 148 -
Of Settlements on the Wife at the Time of Separation - - - - - -
Where a Settlement is made upon the Wife at the time of Separation from her Husband or upon articles of agreement it has been said that in Case she becomes a Pauper Still her Husband will be liable for her Maintainance - But of late the principle has been doubted. Yet there has been no

no decision overturning it. Judge Reeve thinks that a decision to this effect would be Correct

When a Settlement is made to the Wife's sole & Separate use, she will have the Control of it But if the Settlement of Real property is made to the separate use of the Wife upon a separation it is otherwise

P. in. Ch. 156. 3. Vs 437

Of the Husbands taking Mortgages to himself and Wife Jointly

When the Husband takes a Mortgage to himself & Wife Jointly & dies it would in England belong to the wife by the Jus accrescendi 2. Vern 683—

And Judge Reeve is of opinion that in such case the Interest in the Mortgaged Premises would still go to the Wife, in those States where the Right of Survivorship is not Recognized for it would be considered in the nature of a Conveyance to her from the Husband— If the Husband and Wife Covenant to Convey Lands the latter not being

bound by any act short of a Conveyance wo-
-uld not in this Case be compellable to it
1 Roll 375 - 2 Vern 61 -

When Lands are Mortgaged by the Husband
and Wife if the money is not paid at the day
but the Husband takes out a further sum
still it would be on the Mortgage & be Cov
-ered by it - 1 Vern 41 - 407. P. W. 347. -
When the Husband borrows money and the
Husband and Wife levy a fine of the Wife's
Land as a Mortgage for it and the Form
er dies the Mortgage shall be paid with
the Personal Assetts of Husband although
ntable Legacies in the Will be thereby lost
yet all the Husbands Assets shall be prefer
D the Mortgagee - P. in Ch. 264. 3 Bro 200 Abr 150
If the wife Mortgage her Estate to disencu
-mber the Husbands & he dies. Still she shall
be remunerated by the Heir upon the enj
-oy her Estate so disencumbered 3. Atk. 384.

Of the Wife's Settlement

when a woman marries she gains a Sett
lement in the Place where her husband

belongs without any Removal - But if the Husband has no Settlement the Wife of Course gains none by the Marriage but re-tains her Maiden Settlement as in Case the Marries an alien -

when a new Settlement is gained the old one is consequently lost - for no one can possess two different Places of Settlement at the same time - Burn Just. 374. to. 79 -

It has been made a question whether where a woman marries a man having no Settlement & who leaves her - She can be removed to her original Settlement - Authorities are contradictory on the Subject - But Judge Reeve's opinion is she can be so Removed -

A marriage tho not consummated in a legal manner was sufficient before the enacting of the Stat 26. Geo. 2 - to give the wife a Settlement with the Husband But that Stat Requires all Marriages made otherwise than there Pointed out to be null & void

Hence the effect of giving the Wife a Settlement is destroyed - Here where we have no

no Statute it seems that a long Cohabitation & residence together in one place as Husband & Wife will be Sufficient Evidence of a Legal Marriage to gain her a Settlement

{8 Mod 320

In Com: Law Statute ordains that a Residence of Six Years shall entitle any one to a Settlement — Here it is the received opinion altho there is no decision to that effect that the Wife may gain a Settlement by Cohabitancy when the Husband has none Of their being Witnesses for or against each other — It is a Gen: Rule that Husband & Wife Cannot be witnesses for or against each other either in Law or Eq: nor shall the latter be a witness against the Husband tho he might be admitted to swear against himself and even tho all should Consent she shall not be permitted to testify when the Husband is a party for she may have a bias upon her mind. and also it might tend disturb domestic Peace & happiness. 4 T. Rep 478 2 Hawk =531 Hardw 252.

this disability does not extend or operate in any of the other Private Relations, but merely goes to the Credibility of the Witness to the Gen: Rule there are some exceptions as in the Case of Treason which by the English Law Permits them to testify against each other. but whether this exception would be recognized in this Country is uncertain — Another exception is where the Husband is guilty of Personal abuse to the Wife & he is Prosecuted to find Sureties for his good behaviour. here the wife is a good witness for the King - this was first admitted in the Case of Lord Audley. Hob 115 — The decision was much clamoured at and frequently denied to be Law until finally settled by a Case in Strange 633 —

Of the Husband & Wife's Justifying Batteries in defence of each other —

A Husband may be Justified for a battery in defence of his Wife. where she could be Justified for a battery in defence of herself — and so vice versa as where the Husband killed

a man while attempting to Ravish his Wife the only question made was whether the Wife would have been Justified had she killed him & as there could be no question as to that. the Husband was consequently excused - But a principle of Policy forbids a mans avenging his own wrong —

Marriage

The contract of Marriage is celebrated in different manner from all others. In Eng: every marriage not celebrated by a Person in holy orders is by Stat. declared void. In Comm: it may by a Justice of the Peace be celebrated within his Jurisdiction or by a Clergyman Settled in the gospel Ministry within the County in which his settles. unless his Parish extends in two Counties & then in either -

Whether a Marriage by any other Person would be *ipso facto* void is made a question. If any Person not Authorized by Statute to Marry should attempt to marry a Couple he would be punishable - but it is to be

apprehended that if a Serious Marriage were intended by the Parties such Marriage would be valid — 1 Salk 120 - 437 - 8 -

So if any Person authorized by Stat. should marry a Person when there had been no Publication of Banns or without Consent of Parents or Guardians he is liable to the penalty of the Stat. - Yet it is not to be construed but that the Marriage is valid

From Authorities Judge Reeve is of opinion that such Marriage would be binding and the Issue legitimate — 1 Co Dig 545 Sydf. 64. 3 Lev 376 - 1 Salk. 490. 5 37 — 2 Salk 437 Comb. 473 -

The age of which the Parties are considered as capable of Contracting Marriage by Law is fixed at 14 in Males & 12 in Females - Yet if either of the Parties are under this age at the time they are Married on arriving at the age they may either of them dissent & the marriage will be dissolved — 5 Co 22. Rolls A 340. Co Lit 33. 7. Co. 43.

By the Stat Hen. 8th no prohibition (Does Law & Custom) shall incroach any Marriage without

=out

the Levitical degrees - therefore all marriages within the Levitical degrees or contrary to Gods Law are voidable - those supposed to be prohibited by Gods Law is where there is a Precontract, or impotency in either of which Cases the Marriage is voidable only by the Eccl. Ecclesiastical Law a divorce being requisite to annull it. Cro. Eliz. 857 - Precontract cannot now be considered as any objection to the Marriage. 1 B.C. 435 - And the Marriage is good until the divorce takes Place and if the Parties die married their Issue cannot be Bastardized By our Law a Marriage may be void by Reason of a Prior Marriage as in Eng. So also our Law Prohibits Marriages within the Levitical degrees except that the Statute permits a man to marry his wife's sister All within the 3d degree whether by consanguinity or affinity are within the Levitical degrees & all such Marriages by our Law are absolutely void tho by the the English Law they are voidable only by divorce, Vaugh 218. 220. 240. 2 Rose 16 -

Idiots & Lunatics are incapable of Contracting Marriage for they cannot consent to any thing tho the Contract was ever so advised, yet the advice is not not now held to be Law

{1 Roll 340—

The Authorities generally on the Subject of Marriage are. 1 Roll a 36. 5 Co 98. Cauth 27. 271 - Co Lit 250. 1 Salk. 121. Cro Car 462 —

Divorce

Divorces are of two kinds. a Vinculo matrimonii & a mensa et thoro — The former absolutely destroys the Marriage so that the parties may marry again — the latter gives the Parties liberty to live separate & entitles the Wife to her earnings & exempts the Husband from subscribing her. but the Parties cannot marry again — the Causes of a divorce a Vinculo are such as would avoid the marriage at the time it was entered into The Causes of a divorce a mensa are such as arise subsequent to the Marriage as adultery &c — 8. Co Litt 235. 1 Ch. Cas. 44. 164 —

By our Stat. all Marriages within the Levitical

degrees are absolutely void of Course the Issue of such Marriages are Bastards. But it is otherwise by the Eccl. Law — When divorces a mensa are (allowed) granted, Alimony allowed the Wife —

The Causes for which by Stat. the Sub. Court may grant divorces in Connt. are Fraudulent Contract willful absence with total neglect of duty for 3 years Adultery — 7 years absence unheard of. In the last Case no evidence is necessary, for such absence furnishes sufficient presumption that the Party (Husband) is dead as to authorize the wife (other) to marry again — There is nothing said in the Stat Relating Precontract or inability but even the words Fraudulent Contract the latter has been considered or included When the Husband is the Party in fault the Wife is by Stat. entitled to dower. But when she is the faulty Party the Husband is not entitled to the Courtesy —

The Sub. Court when they grant a divorce may set out a Part of the Husbands Estate not

exceeding ⅓ to the Wife & when set out will vest in her — Marriages within the Levitical degrees by our Law are prohibited and considered void absolutely The Issue of such Marriage are Illegitimate without the Intervention of a divorce — a divorce is never had in such case the Stat. having Considered impossible in every Instance that Persons Related within the Levitical degrees should intermarry — there is one exception to this for by our Stat the Husband may marry his deceased wives Sister —

Whenever any other Cause of divorce exist than those already mentioned application is to be made to the Legislature & it is no uncommon thing for them to divorce for Cruelty or well grounded fear of the loss of life or limb or some great bodily harm.

They also divorce a vinculo matrimonii & a mensa et thoro as they Judge most proper they also when they think proper allow the Wife alimony

Addenda

After enacting the Stat. of distribution a question arose whether the Husband must distribute to the next of kin in like manner as the administrators were obliged to do & this question was settled by 29th Car. 2nd

{2 Mod 20-

If an annuity is granted to a feme sole and she marries & during Coverture arrears accrue such arrears belong to the Husband ~~to the~~ as such and not as administrator by the Common Law but by the Stat Hen. 8th Such arrears are given to him absolutely — Cro. 3. 4 Co 81 — — In the 2 Vernon 6. a question is made whether the Extr. of the Husband is entitled to the Choses of the Wife on the death of the ~~wife~~ Husband who hath Settled on the Wife a competent Jointure and it was determined that they belonged to the Wife — The distinction Judge Reeve alleadges to be this when an Estate is Settled as Jointure it Bears down but mere Annuities as a Purchase of the Wife's Choses, by the

Husband, but any other adequate Settlement not
a Jointure will not Bar the Wife of Dower
but operate as Purchase of her Choice ~~other~~
~~a wife~~ When a Wife Possessed of a term for
years an alien her Husband obtains no
right by the Marriage to dispose of Such
Lease — 1 Mod. 104

The Husband has the Same Power over Leases
in Trust for the benefit of the Wife unless
expressed for her separate use as over Leases
granted strictly to her & to the profits arising
from them unless the term is settled for
a Jointure for the maintainance of the
Wife after his Death { 2 Ch. Cas. 86 Trin 82
{ 1 Buck 118—

There is a Case in Vern 14 & 18. which is cited
in the 3 Hob. in which the question is Rais
ed — a feme sole conveyed her Lands by Lease
to trustees for her self & Married & Revived the
Rents. Part of the arrears She let out & took
Bonds & other securities & died — the question
was whether the Husband must hold this
Estate as her administrator in like manner
as

as her Choses as in his own Right as Husband
It was adjudged that he held such Terms
and Debts as Husband and that he need
not inventory them — Yet there are
Cases in which a different doctrine was
holden — Cro Eliz. 166 Tabb 185 Lain 113. 2 Term 62
In Ow Rep 205 there is an Authority which pro-
-ves that an action on a promise to a Wife to
pay her so much for her Service may be sus-
-tained in the name of herself & Husband, It
is manifest that She has no possible Interest
in the thing Promised for it belongs to the
Husband & he might bring an action in
his own name for it alone
The Husband may in an action for a Battery
upon himself demand damages in the
same declaration for a Battery upon his Wife
per quod Consortium amisit
When a Wife is Joined for a Trespass Riot or
other offence such fine shall not be levied
upon the Husband — 1 Co 68 —
The debts of the Wife contracted while Sole
are discharged by the Bankruptcy of the Hus-
-band.

and in Case of his death will not survive against her

1 P. W. 249, 257.

In the first of Lyd 114 there is a Case where A ~~man~~ Married B. who had a large Personal Estate she died & left a Grand Child a Pauper It was Resolved that A. should maintain such Child, this Case is not analogous to the Gen^l Law that the Husband is not bound to fulfill the duties of the Wife after the Coverture is at an end

When an action is Brought against Husband & Wife for a Battery by both. the former is not Guilty & the latter Guilty the Judgment must be quod Capiantur

In the 6 Mod 171 is an Authority to show that a woman who Elopes with an Adulterer & has thereby forfeited her dower, is married again by the Husband she shall have Dower & he is liable again for her Contracts for necessaries — Settlement of Property upon a wife by articles of Separation does not affect the Right of Purchasers or Creditors unless there is a Covenant on the part of some Friend to

the Wife, or his trustee to indemnify the Husband
That Courts of Chan.y have often decided a sep
arate maintainance is inadmissable and
seemed to be understood by all Lawyers & Judg
=es to be settled Law until lately — that in
all Cases of Separation when the separation
ensued on an agreement that Courts of Chan.y
had the power of decreeing a separate main
tainance — some late decisions Ex parte
Hire doubtingly questionable {3 Ves 352 —
Where separate Property has been provided has
been provided for the Wife by articles Previous
to the Marriage, if such Wife Elopes from
her Husband and lives in a State of adultery
yet upon a Bill in Chan.y by the Wife for a
specific Performance it will be decreed
against the Husband {3 P.W. 268 —
Lutwin Case in the 8th Mod 22 is an authority to
prove that a husband after an agreement
between him & his Wife to live separate
he cannot compell her to cohabit with him
The Court holding such Contract as binding up
=on both until they had mutually dissolved it

In Finches Rep 73 there is an Authority which Proves that a deed by a Husband in which he agreed to allow the Wife a Separate Maintenance was confirmed by the Court (anno)

Where a Husband gave a bond before Marriage to his intended Wife stipulating to leave her a certain sum in case she Married him. It was decreed in Chan.y to be Paid before the debts { Finch 233—

In the 9th Mod 70. 79 there is an Authority to show that property devised to a Feme may be holden as her separate Property the intention of the testator being fairly understood taking the whole will together altho it was not so in the will expressly intended to be his intention — — A feme covert who with her Husband levies a fine of her Lands with warranty the deed of Release to a fine being as Conclusive upon her as a fine would be { 12 Mod 161—

The agreement of the Wife to levy a fine of her Lands will by Chan.y be decreed agst her after the death of the Husband { 2 Vern 225

When A. leases Land to B & C. who are Husband & Wife the Husband Commits waste & dies if the wife affirms the Lease by accepting the Land she will be liable for the waste Committed by the Husband otherwise if she waives this Acceptance as she may do —

All the Cases of Contract when the Husband is permitted to Join with the Wife, when she might have sued alone are Cases of express promises to the Wife — We find it said in Cautlen 251 that the Law will not imply a promise to the Wife altho' he can the meritorious Cause of the Right of action & in such Case the Husband must sue alone —

In 4 Mod 156 is an Authority that on implied Contract for work done by the wife the Husband Cannot Join the Wife

In the Case of Bright & Acclamy 2 Vent 195 the Judges differ Adjusting the question whether the wife could be Joined in an action of Trespass quare Clausum fregit on the Land of the wife — The division of the question

Judge Reeve apprehends damages according to
the Nature of the injury - if the Tenant cuts off
-ited the inheritance as by doing damage to
the House - destroying the trees, or Ploughing
the Soil she ought to be Joind for in such
case the action would survive to her on the
Husbands death - But if the injury was
to the emblements it could not be necessary
any to Join the Wife for such cause of action
would not survive to the wife. Yet her profits
being the meritorious cause of action the
Husband has it at his Election either join
her or not

In Cro Jac 44 it is by the Court in a case where
on a promise was made to a feme Covert
in Consideration that she should cure
certain wound to pay her £10. that if the
Baron dies such cause of action survives to
the Wife - This is analogous to some mod
ern cases where a Legacy was given to the
wife during Coverture & not collected and
the Baron dies. the Right to Recover sur
vives to the wife - It is apprehended to disco
-ver

the principles upon which such decisions are
founded, for there can be no question but
that the Husband may sue without the wife
and Recover all Choses of the wife which
accrue during Coverture — And in the pr
initial Case the Husband even exclusiv
ely entitled to the Services of the wife
It is true that by the Courtesy of the Courts
when there is an express promise to the wife
the Husband may Join the wife, but in
such Case it is not because the wife has
any the Remotest interest therein
In 2 Co Can 399 there is a Case of an Estate
granted in Reversion to Baron & Feme and
to the Heirs of the Baron in fee — the Bar
on Brought an action in his own name
against the tenant to Recover damages for
not Repairing the house according to the
Covenant, in the Case it was objected that
the suit ought to have been in the name
of the Baron & Feme as both had an es
tate therein. Yet the Court Held the acti
on to be well brought

The Will of a feme Covert so far as it rela=tes things in actie avoid and that the Husband may be made Executor. See Brooke on devises or in year Book. Fitz. 4 Hen 6—

A feme Covert may devise her Lands to her Husband when there is a Custom of a manor to that effect { Litt. 123—

And a feme Covert may devise when by Custom Lands were devisable but cannot devise them to her Husband— because the devise being in his favor it might be presumed to have been done by Coertion But in the Case last Cited there was no objection on the ground of Capacity Resulting from a State of Coverture

{ Brook, Devise pl. 18. 3 Ca. 3. 6 Ca. 3—

There is a Case Reported in Ambler 629 where the Husband had covenanted that the Wife should have Power to devise her Real Property and accordingly she did so but it was holden that such devise was void for by the Stat 24 Hen. 8th She was reputed incapable of devising her Real Property & that the Husband

could not remove this disability Created by Statute — Many Authorities were introduced to Show that the Husbands agreement here Recited such will valid — But the Court observed that all the Cases were of wills of Personal Property — and said there could be no doubt but that the Husband could give the Wife Power to dispose of Personal Property by will — but otherwise of Real Property because the Statute forbids it This must be conclusive that the Com. Law never Created any disability in the Wife to devise any more than in any other Person for if it did the will of the Husband could no more remove a Com. Law disability than Created by Com. Law than one Created by Statute — When the Husband promises the Wife that if she will sell her Lands and give him the avails that he would leave her the same so Received — such Executory Promise is not binding upon the Husband. Yet if he Should give a Bond to a third person in Trust for his Wife in performance of such

Person it will not be fraudulent as against Creditors 2 Leav 148.

A gift to the Wife as donatio causa Mortis is good. 1 P.W. 441 An agreement by Husband & Wife previous to the marriage is not extinguished by the Marriage 2 Cas. 118

In the 4th Co 60 it was holden by the Court that Marriage was a Countermand of a will of Real Property made by the Wife - which still in Force which appears to be the same case - it is said that Anderson considered the Marriage of a Feme as a countermand of her will, the other Judges held indeed the will was void but it was because at the time of making it she was incapable of making a devise of Real property by Reason of the Stat of Hen 8th

A settlement by a woman upon Marriage of her Estate to her absolute use without the Husbands will not bind him 2 Ves 17.

The Wife may be a witness to prove her Choice a Bastard. 2 Rand Rep. 77

The wife cannot be a witness either for or

against her Husband altho all parties Consent
altho it has been frequently said that in L.
Audleys Case of his Wife being a good witness
on an information against him for Personal
abuse was not Law - Yet Judge Reeve
says he is not able to find a single decision
in point against this opinion. for the Cases
where this has been said, they were not Cases
of Personal hurt to the wife - The doctrine
in Lord Audleys Case has been confirmed
in Agincs Case in Strange - And in Lord
Lovibs Case the affidavid were Read to lay
a foundation for an information agt
her Husband for his Personal violence to her
In Office of Exrs 2. Vol. it is said
that when the Wife has debts due to her she cannot
by making an Exr. deprive her Husband
of the Right & benefit that might ac-
-ise to him by being an Administrator. but
that it is otherwise of Goods. The holds as
Exetrix for no benefit could be Reserved
to him in that Case for they go to the use
of him to the testator - It seems that the

soundness of this doctrine as expressed in the first Clause is questionable for the Husbands right secured by Stat. is no other than a Stat. Residuary Legatee after debts are paid if there is no will & certainly not a material Right at Com. Law—

Whether a Marriage Regularly Solemnized which was obtained by means of the fraud was void or not has been a subject of very discordant opinion 5 Vin. ab 35. and Authorities there cited

It is difficult to conceive why a Contract confessed to be the most important of any that can be entered into, should be avoided when obtained by fraud — when all other contracts obtained in this manner are void the Authorities also teach us the marriage of an Idiot is valid — and assign as a Reason why it should be so — that an Idiot can consent to marriage — if his Consent to this Contract binds him why is he not bound by all other Contracts to which he consents. if his misunderstanding be such that he ought

not to be bound by those Contracts - neither ought he to be bound to his marriage Contracts - When alimony is given to a divorced Wife it does not affect Creditors but the Husband is Personally liable - When there is a divorce for the Cause of Adultery it is only a mensa et thoro & neither the Right of the Husband or wife as it Respects property except such as is acquired by the Personal services of the Wife are affected by it & the wife shall not be entitled to dower

& Cas Litt. 1-3

In Connt such a divorce is a vinculo Matrimonii and all the Consequences take Place except that the Issue are not Bastardized and the wife being the Innocent party shall be entitled to dower -

In Eng. it has been holden that in case of a divorce a vinculo Matrimonii which proceeds upon the ground that there was never a Lawful Marriage - if the Husband was in debt before marriage he is still debtor, the divorce and all the Property which he

Remind with her Rights to the wife - if this Property has been by the Husband conveyed Bona fide to others, the Right of such third Persons are not to be affected L^d Ray 5-21-

& Cro E. 906

A divorced a mensa et thoro is not entitled to the administration of her Husbands Estate nor to a distributory Share thereof

& P. in Ch. 111-

Parent & Child Dr. M. Goulds

A Minor Child or Infant is any Person Male or female under the age of twenty one years - The day preceding 21 is that of Minority or Infancy { 1. Blac. 463 Lit Inst. 194 Sect 259 —

This age (21) is the age of Maturity or as it is sometimes called full age - the Person being Sui juris & Capable of acting for himself —

The Privilege & disabilities of Infants

first of their Privileges as to forbidden acts Committed by them —

No Infant under the age of 7 years can in Legal Contemplation be guilty of an offence for at that age they cannot be Considered as having Volition & of Course Capable of distinguishing between good & evil And further to Constitute a Crime there must be a Criminal intent in the Committer but here by the Supposition there Can be none

It is a gen. Rule that Infants having attained

the age of 14 yrs are punishable for their offences in all cases where an adult would be subjected — ——— 4 Blac. 201 Hale 25. 1. Haw 1. 1 Inst 247

The Person in infancy between the ages of 7 & 14 years are sometimes called the dubious Period — The Infant is Punishable while between the ages of 7 & 14 if considered doli Capax which is consonant with the Maxim Malitia Supplet etatem but here the onus Probandi lies on the Prosecutor & 1. Haw 1. 1 Hale 26-434. Inst C. L. 722. 1 Bl 464.

It has been laid down Genl that in some cases Infants above the age of 14 — were Privileged as to Misdemesnors & some Crimes not Capital. but the Particular Cases or Clases have not been Pointed out Mr Gould is of opinion that they must be those cases of such in the Crime Consist in Neglect or omission for as the Infant has not the Control of his own Person or Property he Cannot be Considered as the Master of his own acts. but this Rule will not excuse him from the Commission of a forbidden act — & 4 Bl. C. 22. 3. Bl. 130 1. Hale 20-1-2—

As an Infant is Privileged with Regard to Offences. So it is a Gen.l Rule of Practice that an Infant is never to be Convicted on his own Confession without great Caution

& Cro Jac. 466. Fost. 70

The Presumption in favor of Infants under the age of 7. Cannot be Rebutted for it is Presumptio Pueris doqine Plow 19. 4 Bl. 337

& Cow 222 Fost. 439

Gen.l Statutes inflicting Corporal Punishment extends to Infants if they are Named & if they are not Named it seems doubtful how far they would be brought within the Stat. W.m Gould is of opinion that if the Offence Created & Punished by the Stat. is such an offence as is Corporally Punished at Common Law it extends to Infants tho not Named. But if the offence is such an one as is not Corporally Punished at Com. Law. the Punishment Cannot be inflicted on Infants if they are not expressly named

The Privileges & disabilities of Infants as it Respects Torts Committed by them

In Torts Committed by force by an Infant of any age he is liable Civiliter but his age will always go in Miligation or aggravation of damages and upon this Principle it is that Mad men Idiots & Lunaticks are liable for their Trespasses. for the Law of Trespass now Regards the intention of the Trespasser. So also if one in defending himself from impending danger unintentionally injures another, therefor he is liable. & Scott v Shepherd Blew Rep. 1 Vin 395. 1 Wm 3. 2 Rolle 574—

But Regularly an Infant is not Liable for his Civil Injuries Committed without force - Yet as an exception to this it has been decided that an Infant of 14 is Liable to the Party injured in an action of Slander - And as this is the only Case when an Infant has been sued for words spoken it has been inferred that an Infant under the age of 14 - Cannot

be Subjected for a Slander — But Mr Gould thinks there is no foundation for such an opinion nor any from which such a Conclusion can be drawn Ed Roy 129. 3 Bac 132

Tho an Infant is liable for his torts yet that Shall never be Converted into a tort which arises of Contract Ed 8 Jn Rep 335

It has been one holden that if an Infant takes upon himself to trade as being of full age he never Shall be allowed to take the benefit of his Infancy. for this the Court said would be to allow him to take advantage of his own fraud —

But this opinion is now denied to be law for the Same Reason would apply equally well in all Cases of a Similar Nature

Ed 12 Vine 203

In some Cases however a Court of Chan. will deem a Contract to be good & binding upon an Infant tho not for Necessaries & for this Reason that a fraud may be Prevented - not as has been expressed upon the ground of fraud ——— Ed 2 Eq. Cas. Ab 489 Pont H 70. 72 —

The Privileges & disabilities of Infants as to Certain Miscellaneous Contracts

By the Com. Law the Lawful age of both Males & females is fix'd at 14 for Choosing a Guardian & 1 B.C. 463.

But by the Stat. of Comm. a female may Choose her Guardian at 12 & a Male at 14 as at Com-Law — & Stat of Comm. 24.

An Infant of any age even in ventre sa mere may be an Executor (ie) may have the Right of an Ex^r & Possess an Ex^r Interest in the Testators Estate — But Such Infant Cannot Execute the Privileges & act as Ex^r. until he arrives at the age of 17 — at which age an Administrator durante Minore ætate — else no effects can be administered

& Wentworth Office of Ex^r 317, 5. Co. 29 Hob 255. Car 466. 7. Sal 39. 1^d Ray 326.

But an Infant Cannot be Administrator or for at Com Law he is Bound to give Bonds for a faithful discharge of his Trust and as the Bond of an Infant is of no validity he Cannot bind himself for that Purpose

But the Reason does not hold at Com. Law as to Exrs. Yet by our Stat. as both Exrs & Administrators are bound to give Bonds it has become questionable whether either of them — can be discharged by an Infant

{5 Co. 29. 5 Mod 395. Com 475. Carth. 446. 7—

The age to contract Marriage is 14 in Males & 12 in females & if either of the Parties at the time of Marriage are under this age Such Party on arriving at the age of Consent may disposent and the Marriage is dissolved. And as one party in the Case will not be bound, so the other hopes the same privilege of Putting an end to the Relation provided it be done within the time limited by Law — 1. Bl. 430 or 36

{Ste 937-1 Inst 78 a or 9—

But a female it is said may be betrothed at the age of 7 and at 9 is entitled to Dower

{Lit Sect 36. 2 Blac 131. 2 Blac 463

It is not Settled in Eng. at what age an Infant may dispose of his Personal Property by will tho according to the prevailing opinion it is fixed at 14 in Males & 12 in females

which opinion is Sanctioned by the decisions of the Ecclesiastical Law Yet various Contradictory decisions upon this Point have pre=vailed the age of discretion in this Respect at 15. 16 & 17 — 1 Inst. 89. 2 Bin 104-469. 2 Mod 318. Prin Ch. 316 1. Blac 463. 2 Leo-497 —

But in our State this question is put at Rest & the age of disposing of Personal Estate by will is fixed at 17 in both Sexes

{ Statt of Comm. Tit. "age"

Full age is Completed on the day Preceding the 21 anniversary of our birth — Salk 44-625

{ L. Ray. 480. 1096. Swan envi. 144. 686. T. Ray. 84

The Privilege and disabilities of Infants in Relation to their Contracts —

It is a gen= Rule that no Person within the age of 21 years Can bind himself by his Contracts — for in as much that age he is not in the eye of the Law Possessed of Suffici=ent discretion to Contract

The Contracts of Infants of Infants are either Void or Voidable. between which there is a material difference as will hereafter be

Shewn

Tho an Infant Cannot bind himself by his ordi=nary Contracts. Still this disability is for his own benefit - hence it appears if an Infant Join in Note. bond or obligation with an adult - Such adult will be bound tho the In=fant is not - but the Privilege is the Infants only & does not Communicate with his Joint obligor { 1 Root 58 -

Again if an adult enter into a Covenant with an Infant the former will be bound by the Covenant tho the latter will not, and this upon the Principle before laid down

1 Pow. Con. 38. 1 Mod 25. 1 Vint 51. Cro Car 502. 2 Stra 937

{ 1 Sid 41. 446 & the same in Equity as in Law 1. Pow Con

{ 39 - 40 Vinn 343 -

But whether an adult will be bound by his Contract with an Infant will depend upon there being a Sufficient Consideration - Yet if the Consideration is in it self void it will not be binding for a void Consideration is a nu=ll Nullity - Still if it is only voidable it is Sufficient for in this Case it is Sufficient until avoided { Stra 938 - 1. Powon Con 39 -

And it seems that if an Infant have received a Sufficient Consideration on his Part and afterwards avoids it he is not bound to make Restitution of such Consideration for it is Considered in Law as a gift to him from the Person Contracting. Tho this Opinion has been very much doubted by Elementary writers. Still Mr Gould is of opinion that it is Correct & Supported by Authority

Ed Sec 129-1 Fea. 169. Reb. 905. 913. 3. Bac 140

But that an Infant Cannot bind himself by Contract is a general Rule. Yet it is a well established exception that an Infant Can bind himself for Necessaries which are defined to Consist of food, Clothing, Medicine & instruction all which must be Suitable to his Station & degree — 1 Pow Con. 34. 5. 1. Bl. 466. Cro Jac 494. Hu Rep 578—

This exception is founded upon a supposed necessity. for the Law intends to guard Infants against their own Improvidence — and also to enable him to preserve his own existence Still every thing that Comes within the

denomination of food Clothing &c may not be Necessaries for the Rule requires that those which are necessaries Should in fact be Necessary for the Infant at the time of Contract=ing - hence if he is furnished with the necessary Clothing at the time of Contracting he Cannot bind himself for more

{Cro E. 583 - Cro Jac 56. Dyer 151. Palm 361 -

From the nature of this Rule it is Clear that some direction as to the application of them must be left to the Jury - for tho what are Necessaries is a question of Law - yet what are necessaries at that time for the Infant is a question of fact - because what may be deem=d Necessaries for one Possibly may not be for another - as this depends upon the Parties Rank & degree in life - what amounts to necessary instruction also depends upon the Jury to dec=ide for it is a matter of fact which rests ~~with the Jury~~ upon Circumstances - It would be Preposterous to Suppose that the Son of an in digent Mechanic is entitled to an education of the same nature as a man of large income

yet the former is liable for such instruction as will be suitable for him under his circumstances in life - this distinction has always been recognized at Com. Law & has been admitted in this Country & Stra. 1101. 1 Ld Raym. 478. Cro E. 483. & Cro Jac. 160. Carth 110 Fort 66. 68.

And as the Jury are to determine what things are in fact necessaries for the Infant at the time of contracting - it follows that if an Infant pleads his Non age to an action - the Plff may reply Necessaries generally and the Replication will be good - for whether necessaries or not at the time of sale to the defendant will appear in Evidence & Carth 10, 4 Bac - 17.

So also as a Minor can bind himself for his own necessaries he can bind himself for the necessaries of his wife & Children - for whoever can make the Principal Contract may make those who are incidant to it & Ld. Raym 161. Stra 168

And for the same Reason if an Infant Marries an Adult he is liable for his debts Contracted before Marriage -

Pro Qu.: an Infant may bind himself for new

necessaries

Yet he cannot when under the Govt. of a Parent or Guardian and is duly Provided for Still he can be Subjected when under the Care & government of a Parent Guardian or Master - if it can be Clearly Shewn that he was not Properly Provided ~~for~~ with the Neces saries Contracted for {2 Blac Rep 1325 Peare Case {229. 2 Atkk 35

Hence from this Rule it follows that an in=fant can bind himself for Necessaries but in three Cases - 1st where he has no Parent. Guar=dian or Master - 2d when he is Eloigned or Removed from them 3d where when under their Care he is not duly Provided with the necessaries of Life - But here it is to be obser=ved that the Provision goes no further than the necessity of the Case Requires for the Preserva=tion & Protection of the Subject - taking it for granted in the two latter Cases that the Parent Guardian or Master is bound to Provide &c - It is to be apprehended that they as well as him self will be liable on such Contract tho it is no where laid down in terms

In Comm it is Provided by Stat that the Parent Guardian or Master Shall not be bound by the Infants Contracts for Necessaries unless the Contract on their Part is assented to - this Stat which has been thot by many to introduce a new Rule may be Considered as an affirmance of the Com. Law. for if this were not the Case the Infant when Eloigned or when not duly Provided for must either be a Pauper or Supported at Public Expence - or the Parent Guardian or Master must be liable for his Necessaries - as the former is not the Case Surely a New Rule is not introduced by the Stat - The two first Cases are not in term affected by the Stat. neither is the Infants Power to bind the Parent Guardian or Master Curtailed for it is Settled under the Stat. that a Contract made by an Infant with the Consent of his Guardian is binding upon both

2 Kirby 287. Stat. Conn 293 487

An Infant is never bound by his express Contract for Necessaries. but is liable on his implied Contract merely to the value of the goods so Purchased 2 Cro E. 583 - Lean 189 Cro Jac 1-60. Poph. 161-

In what Manner an Infant May bi=nd himself

In the first Place it is an agreed Point that an Infant Can in no Case bind himself by Bond Yet he may undoubtedly bind himself by Single Bill or Bond without Penalty for no Man sparin { Cro E. 520 or 926. 1 Rou 729. 1. Keb 382. 416. 423
{ Lea 86. Stra 939 - Pow. Con. 54

An Infant is not bound by a Negotiable Bill when actually Negotiated - But by a Note not Negotiated or Bill not Negotiated he is Bound { 1 Pont 11. 73. 1 Pow. Con. 34-5. 1 Ld Raym 411. 1 Wood = 403. Car 160. Chitt. 20

And finally an Infant is not bound by an account Stated (ie) no Recovery can be had against him upon an Indebitatus Assumpsit with an in=simul Computassent — { Ld Kep. 40

The Reasons for these distinctions are these 1st An Infant Cannot be Bound it is said on a Penal Bond because the Penalty operates as a forfeiture which is to his disadvantage { Mnt. 72 & Cro E. 920
{ 1 Pont 11. 73

But the true reason to be that as the Consideration of such a bond Cannot be examined into

and of Course it cannot be discovered whether it was given for Nonpayment & in such Case the Infant must loose his Privilege of Infancy

& Chitt. 20-1. Pow Con. 36

It has been observed that by a Single Bill an Infant may bind himself. Yet the Consideration of a Single Bill is not to be gone into - But this was not formly the Case for in the Reign of Charles the 2nd it was held that Nonpayment might be implied in a Plea of Infancy when the action was Brot on a Single Bill - from that it appears that at the time when this Principle was established the Consideration of the Bill might be enquired into - But the Reason of the Rule having Ceased, the Rule itself ought to Cease also & 1 Lev 86. 1 Mod 382-416. 23-

3d An Infant is bound by his Note when not Negotiable - for the same Reason that he is bound by his Parol agreement. the Contract being in this Case Simple, the Consideration is never Removed out of view - since the Infants Privilege is never lost - but by a Note already Negotiated the Infant is not bound - for on an action

by the Endorser the Consideration Cannot be gone into and examined. And it would seem that the Rule as to Negotiable Notes cannot hold as to Bills of Exchange & Kid 155. 1. Wood 403. Fonb 6 73. 10 B. Rep 445 Chitt 9-51. 82. 2 Ln Rep. 71. Peake, Cas 61. 216. Stra 644. 1. Esp Rep 114. 262. Doug 61 or 612. Dow on Con 34. 5. 341 — Lastly — the reason that an Infant is not bound on an account Stated corresponds exactly with the principles before laid down — the Items of an account Stated — formerly could not be gone into — hence the Rule was established as it now seems to remain. tho at the present day this doctrine is very much Relaxed & Lutw 169 — Noy 87. Cro Jac 602 & 1 Ln Rep. 40 Fonbl 73. 10. on Con 36

There are the distinctions which have been taken in the Law with Respect to an Infants binding himself for Necessaries — It will be observed that in two Cases the Rule Remains when the Reason of it has Ceased — This is certainly an Exception to the Gent Principle. which it will be Supposed will be Regarded here when an Infant binds himself by a Penal

Bond for Nuisance - It has become a question whether the original or Simple Contract can be enforced. if the Bond in such case is void the Infant may be Charged with the Simple Contract notwithstanding - for him it would be a mere Nullity and have no operation at law But if the bond was voidable it would seem that the original Contract was merged according to the established principle - that the higher Right in all Cases merges the lower Remedy - upon this Subject there has been no decision directly in Point the Authorities being those which merely bear upon the question - 1 Ken Black 462

& But N. P. 182. 1 Inst 172 note. Esp. D. 175. 1 Pow C. 168, 114

If a Single Bill is given by an Infant for Nuisance it is voidable but the Simple Contract cannot be enforced for until set aside, it is of Course of a higher Nature than which merges the Lower Remedy - & 1. Espi cig. 164. 1. Bul N. P. 115

& 1 Pow on Con 218 -

In Comm^t Promissory Notes have always been Considered as Specialties and Stand upon the

on the Same footing as Sealed Instruments not
=withstanding which it has often been holden
that an Infant is bound by his Note for Ne
=cessaries & of Course the Consideration ought
to be gone into. by a late decision of the
Supr Court it has been decided that the
Promissory Note of an Infant is Stiully void
Hence we see an action may undoubtedly
be maintained on the original Contract
6 Root 58.

An Infant Can never bind himself in any
form of Contract for money lent unless the
Money is actually laid out & expended for
Necessaries - & at Law he is bound in no
Case unless the Party binding him lays out
the Money - for here the Party binding becomes
the furnisher of the Necessaries - Salk 279. 386
5 Mod 368. 1 Ld Ray 69. 1 Ban Con 37

If the Money lent is actually expended for
Necessaries the Lender may Recover it in Equity
against the Infant to the value of the Nece
=saries Purchased. And the Rule is the same
at Law - when the Lender lays out the Mon
=ey

in the Purchase of Necessaries for the Infant. but
it is not of Course that the same laid out
Shall be Allowed for the Trustee will be
Answered for the value of the Necessaries
Purchased only & 10 Ves 558. 583 - Eq. Cas. Abr. 510
But an Infant is not bound by his Contracts
for articles which are Necessary for him to Carry
on his trade. for the furnishing of these
is the duty of his Guardian - & Cro Jac 494
& Salk 279. 2 Str. 1083
And if the Infant is the owner of buildings
he is not bound by his Contract for their
Repairs & 3 Salk 196 - Rowe on Con. 36 -
There is one Case which as Mr Gould thinks
is to be distinguished from the examples given
This is where an Infant is bound to Pay the Rent
of a House of which he is the Lessee in
Case the annual Rent does not exceed
the annual value - any Contract of the
same Nature might be qualified in the same
way. Cro Jac 320. 2 Bull N. Pri. 69. 1 Rowe on Con.
& 35 - 1
It will be recollected that Instructions will

be classed with those Necessaries for which Infants can bind themselves. but what will be deemd a Necessary Education will always depend upon the Infants Situation and degree - In the Reign of Charles 2nd it was held that an Infant could not bind himself for instruction in Singing and dancing But as to the latter Mr Gould is of opinion that as the Manners of the People have so much changed Since that decision it would at the present day be adjudged otherwise

6 Sid 446 - 1 Powell Con 36

It has been holden by the Supr Court of this State in the Case of Stanton v Wilson Exr of John Bird & the decision affirmed in the Supreme Court of Errors that a Collegiate Education was proper for an Infant whose father was a man of large Estate & that the Infant in such Case could bind himself as well as his Father by such Contract - for it is obvious that an Infant is not bound to Perform any Contract but those which are for necessaries. Yet if an Infant does

that which he is not compellable to do at law or in Eqt - it will be conclusive against him and he will be bound by the act 3 Burr 1801 1 Blau Rep 575 - 9 Co 85. 1 Inst 172. a. 315. a. - 3 day 57

An Infant defts is as much bound by a decree in Chan. as by a Judt at Law - Except agst the former he may have a day in Court for the purpose of impg it either for fraud or Error. this day must be improved within Six years or mo. after the Infants minority has expired 1 Vern 351. 9 Mod 128. 10 Mod 504. 2 Ca. 46. 3 Ca. 31

An Infant Plff is bound when an account would be by a decree in Equity unless he can shew either fraud or grop negligence in the Prochin any 3 Atk. 626. 1 Scott 66. 75

As a matter of Course he hears no day in Ct unless for this Special Purpose. for it is presumed that in obtaining the decree he acts voluntarily - hence he is precluded from his day for any other Purpose

The Rule that an Infant cannot regularly bind himself for by his Contract except for Necessaries is intended as a guard

to his Rights from his own indiscretion
But such acts of an Infant as do not eff
=ect. but are meerly done in another Ri
=ght will bind him for here the Reason
of the restraint Ceases to operate —
An Infant as well hereafter appear may
Execute many offices - as for example that
of Exr and by the acts in the execution of
that office he is Regularly bound for the
in another Right — Ɛ3 Burr 1802~
When the Period of an Infants Legal inci
=dention Ceases he may Satisfy those cont
racts which he has Previously made but by
which he was not bound - Yet this Rule do
=es not hold where the original was in it
self void for then it is deemed in Law as
if it had never been Ɛ1 Stra 690. 2 Ter Rep 766
Ɛ1 Fonbl 131. 1 Ter Rep. 648. Chit 21
Thus if an Infant Should make a Contract
upon an usurious Consideration this he
Can never affirm. and a Subsequent Prom
ise will not bind him - but when an
Infant gives an instrument binding himself

to the Performance of a Contract if such instrument is absolutely void he can affirm the Simple Contract & Bullen N.P. 155. Esp dig. 164

Yet tis not to be understood that the cases where the original Contract is merely voidable because the original Consideration has been merged in the higher Remedy - & Idem ——

When a Person after he attains full age affirms a Contract or Promise which he made while an Infant - he is bound no further than this new Contract extends

& Esp. dig. 164

If the Pltff Reply to a Plea of Infancy that that the defft after he attained full age Confirmed the Promise, Pltff must only prove a promise - & defft must Shew that he was under age at the time & Lit Rep 648. 3 Burr 1372 Mor

& 1 Esp dig 164

If an adult Jointly interested in a loan with an Infant obtains a Renewal to himself only if the loan prove a beneficial one he Shall be held to have acted as trustee

and the Infant may Claim his Share of the benefit - but if it do Prove a beneficial one he must take it upon himself

1 Bor 2 Pul 376.

If an Infant is arrested upon Cause of action when his Nonage is good defence he Cannot like a feme Covert be discharged upon Motion but must Plead Infancy 1 Bor 2 Pul 480

What Contracts of Infants are void & what voidable -

The Contracts of Infants which do not bind them are either void or voidable - And Eng. Ct. have of late been inclined to Construe such Contracts voidable Rather than void for they were Strictly void the Infant may insist in his Power to affirm them - But voidable only he has his election whether he will affirm them or not - and Perhaps it might frequently be for his benefit that he Should -

1 Burr 166. 3. do 1805. Stra 938 -

As to the question of what Contracts are void and what voidable it is laid down as a

Gen: Rule that in those Contracts of Infants where there is an apparent benefit or semblance of benefit to the Infant such Contracts are voidable — But those in which there is no apparent benefit or Semblance of benefit to the Infant are void — Cro Car 507 & 1 Roll 730 - 3 Mod 310. 2 Hen Blac 511. 8 Mon Con 33. 8. 54

This is the Rule of distinction as taken in the Books - but which especially the latter part appears very incorrect as will be shewn hereafter Mr Gould takes the principle to be that the Contract of an Infant is voidable merely whether there is an apparent semblance of benefit to him or not Hence the Purchases of an Infant are voidable for they are supposed to advantageous to him - & when he has made a particular Purchase he may afterwards dispent to it — Inst. 2 - 3 - 8 - 1 Roll 370. a. Cro Jac 320 & 1 Vent 203 -

Hence also a Power of Attorney made by an Infant to another authorizing him to accept a Seisin for for the former is void

voidable and not void –

& 1 Roll 870, Cro Jac 320 –

And upon the same Principle it has been
recently decided that an Indenture made
by an Infant Slave Covenanting that he
will Serve his Master is voidable merely
for it may operate as a benefit by effect-
ing his emancipation which is here
implied & Hen Blac 511 –

As an illustration of the latter Part of the
Rule as laid down that a Lease made by
an Infant not Reserving Rent or Reserving
Rent which is, evidently, insufficient, is
void for this is apparently disadvantageous
to the Infant – 1 Lean 216. Moor 105. Noy 130

& Hut 102. 10 Mod 421-4-36-533. 12 do 162 –

This however does not appear to be Law and
Mr Gould is of opinion that such Lease is
not void it is true there has been a Judi-
cial decision on this Point and the Rule
seems to have arisen from mere opinion
without any thing to support it and which
has arisen from writers without any exam-
ination

of the Subject & 3 Burr 1806—

But there are Authorities which are in direct opposition to the Rule for it is laid down in Littleton without Reservation that the Lease of an Infant is voidable — Litt. Sect. 274. 3. Bac. 304 — 1 Inst 45. 308 — 1 Leon 6. Moore 75 & 5 Bac 575—

And indeed L^d Mansfield in the Case of Peirson expressly denies the Proposition to be Law. the Infant Lessee cannot in any case avoid the Lease upon the ground of the Lessors Infancy. hence the Lease is voidable only. for it would be absurd to say that the Contract was void on one side and not on the other also— This argument appears to be destructive of the question — 2. Burr 1816 & 1 Term R 74. 1 Bla Rep 578. 1 Mod 25. 2 Leon Rep 168

It was further argued by Lord Mansfield in case above Cited — but with less force that an Infant could not Plead moment. facturn to his deed. and give the Infancy in evidence to avoid the deed. The Infancy must be Pleaded Specially because it has an Operation

from the delicacy & by Reason of its having the form of a deed - yet the deed of a feme Covert has the form of deed. yet She may Plead Non est factum to it for it has no operation & 3 Burr 1806. Cro E. 187

& 5 Co 119 - 1 do 43 - 1 Powon Con 38 -

From what has been said it may be Concluded to be Law that the Lease of an Infant is not void

A Penal Bond executed by an Infant has been said to be void upon the same ground (Viz) that there was no benefit or semblance of benefit arising to him from it

& 1 Roll 920 - Cro Eliz 920 - Hut 116 - Esp dig 164

There are however many Authorities against the Proposition also - Per Ske 12. 154 - Litt Rep

& 196. 1 Wood - 403 - 3 Burr 1804 - -

It is Settled that an Infant Cannot Plead non est factum to his Bond - Salk 279 - 3 Mod

& 210 - Gilb Ev 162 - 1. Co 119 - 2 Ld Ray 315

There is a Class of Cases in Chan. which is inconsistent with the Law that the Penal Bond of an Infant is void - for it has been

Repeatedly denied that when an Infant by will bequeaths his Personal Estate & dies - a Court of Equity will enforce payment of his Bond debts - here the Court proceeds upon the ground that his bond debts are not void for if this was not the case the decisions are incorrect and cannot be Law 3 Bac 146. Eq. Cas. ab. 282. 1 Wood 403 1. Fonbl 74 - Powon Con 37 -

From this it appears that the Penal Bond of an Infant is not void but voidable yet it is not to be understood to be established Law - for the Current opinion is the other way - the true Rule of discrimination between those Contracts of Infants which are ipso facto void and those which are merely voidable appear to be this - all gifts, grants, sales - deeds or obligations made by an Infant which do not take effect by manual delivery are void but all those which do take effect by manual delivery are only voidable & Co Lit 12. 19 - Litt Ten Sect. 259 - Latch 210 - Roll 730 & Bac 375 - 3 Burr 1804 - 5

By the words "taking effect by Manual delivery" as used in the Rule, is the Covenanting intent by delivery" for the Feoffment of an Infant is but voidable because this passes an immediate interest in the Feoffee

1 Inst 380. 247- 4 Co 145. Hob 178. Co 42 Dyer 164

& 3 Burr 1804-5 Sont 74-5

And if an Infant Sells a Person a Chattel and delivers it the Contract is here voidable yet if the sale is ipso facto void without the delivery it is ipso facto void

& Perk Sect 12-19- Hob 77- Latch 10- Keb 778. 1 Mod 137

That Part of the Rule which Relates to manual delivery is very important for it Constitutes a material difference as to the deeds which Convey an Interest & those which delegate a Power. as the former is voidable while the latter is absolutely void & Litt Sect 259- 8. Co. 42. b.- 21 Vin 186- 3 Burr 1804- Perk Sect 12. 3 Burr 135- Note 1112 Hen Blac 75 1 Blac Rep 537-

In Power it is laid down that the deed in both Cases is void and the opinion of

the writer is given that there can be no distinction taken - Yet this opinion is a Speculative one. unsupported by any argument whatever!!- (this is great I say,)

The Result then is that generally the most universally the purchase of an Infant are merely voidable - but his Conveyances when they do not take effect by manual delivery are void. it also appears that the Rule first laid down (viz) that an Infant is not bound by his Contracts that are not beneficial or in which there is no semblance of benefit to him & are therefore void is not the genl Rule but merely a qualification to the Rule which it has been attempted to establish as the true one & 1 Burr 1804-8-1 Blac Rep & 599-3 Keb 369-

This Rule is not properly applicable to simple Contracts for they do not take effect usually by delivery -

As a genl Rule it is true that accessory Contracts of an Infant are voidable

this not to be viewed however in the light of an Exception to the gent Rule for it is not Strictly within it & Vent 71. Esp cuig 164. 1 Pow Con 388 Mod 25. 137.

A Bond of Submission to arbitrament is but voidable & not void - 1 Bac. 336 & Noy 93. 1 Roll 730. 1 Leo 17

The distinction between the terms void & voidable hath already been Noticed. it will now more Particularly be attended to - if a Contract is void 3d Persons who have an interest or the adverse Party may take advantage of its invalidity But when the Contract is voidable only no other Person only those for whose benefit it was made do & his Representatives can in know the Privilege. 2 Ja Rep 603. Carth 436. Stra 938. 2 Wm Blac 711 & 8 Co 42. 1 Vent 74. 3 Burr 1804.

The Representatives have allusion to are those who Represent the original Party in the Right affected by the Contract

If therefore a Conveyance by an Infant

& none after him but his privies in the Blood can avoid - for privies in this State Reversioners or Remainder men are precluded from intervening to their advantage

8 Co 42. 1 Inst. 347. 1 Roll 455. 3 Bac 142.

Another distinction between a void and voidable Contract is a void Contract cannot be Ratified or affirmed while the latter may. This Confirmation of a voidable Contract may be either express or implied and the Rule is the same as to the avoidance of a Lease when the Infant is the Lessee or when he is the Lessor - Thus if an Infant is Lessee for a term of years he may by Continuing in Possession after he arrives at full age implicitly affirm the Lease - and he will never after be allowed to avoid it. by this Confirmation of the Contract he subjects himself to all the Rent which shall come during the remainder of the term as well as that which has actually accrued during his infancy

Co Litt 131 - 5 Bac 534 -- 1 Inst. 3 - a. Cro Jac. 320

(2 Vent 302 -

And in general any act done by the In-
fant evincing an intention to waive
the privilege will be construed to amount
to a Ratification of the Contract

6. Co. 65. 1. Inst. 295. 171. Stra 698. 2 Vent. 205

But a Contract which is void cannot be
affirmed. for in legal contemplation there
is nothing to confirm. it is a mere non
entity by Ld Raym 66. 3 Co 646. 1 Hen. B. 75. Doug
153. Cowp 201-282. 1 Atk 354. 7 Ind Rep 83

There is also a distinction to be taken (observed)
ueting the time when an Infant may avoid
If an Infant makes a Conveyance by
fine & (com.) Recovery he cannot avoid after he
comes of full age - because he is not at
liberty when he arrives at full age to
make an averment of his disability cogt.
the Record of the Judges which is the high
est evidence the Law knows of. 1 Vent 380

6 Co 122. 12 Mod 199-243. 1 Powell on Con 21.

It has been said that an Infants Conveyance
may otherwise than by matter of Rec
ord is voidable by him both before and after

he arrives at full age - & 1 Inst 247. & 248. a 380.
But this appears not to be Fitz N. B. 192 a
he Law for it is settled that the Feoffment
=t of an Infant Cannot be avoided by him
until he arrives at full age - because the
entry that he must make to avoid it is as
voidable as the Feoffment itself - and it is
Clear that one voidable act Cannot av
=oid another - Hence it would seem that
the Principle as laid down must be in
correct & the Rule is the same as to the In
=fants Conveyance by Lease & Release - 3. Burr 1808. 1 Blac
& Rep. 579. 2 Ves Sen 161.
Mr Gould is of opinion that this must be the
Reason of a Rule laid down by Justice
Buller in a modern Case - he says that an
Infant Cannot avoid a Lease which is for
his own benefit - but taken literally this
is not true - it must mean that such
Lease shall be binding upon the Infant dur
=ing his Infancy - or that he shall come
out during that Period which shall put
an end to it - for while an Infant he can
=not

destroy his own Power to avoid it when he arrives at full age – 2 Ves Ch 161 – 3 Bro 137 –

1 Inst 380 – 2 Bro 69 – 3 Bro 140 –

As there are some excepted Cases in Eq: which do not come within any of these distinctions it may be Proper to notice them in the Present Place – It is to be presumed that the High Ct of Chan. apuns a Sort of discretionary Control over Infants and directs their Consciencies according to the circumstances of the Case but this discretion is to be governed by sound legal discretion and for the Purpose of determining what Cases come within the Rule, the Chancellor is to Consult & Regard the usages of the Ct

Marriage Settlement agreements Made By Infants – with their Parents or Guardians Consent will generally be binding in Chancery – the Reason is that necessary to the Principle or Primary Contract of Marriage and if the Policy of the Law will Permit the Infant to make the Principal Contract it will

also allow them to make those Contracts wch are attendant upon it 1 Bro C. 42. 3 Atk 56

1 Brown Ch. 152.

It is not however Precisely Settled how far a Chancellor may go in enforcing those Contracts. There are some Cases cited upon the Point & from them only one can be cited in his opinion on the Subject.

1 Salk 613 - 1 Vern 501 - Banna 117. 1 P Wms 574. 9 Mod 101. Powon Con 46—

It is ruled that a female Infant may Barr her Right of Dower or bind her portion - accepting Personal Estate in the Room of a Jointure - 1 Br P. Cas. 570 - 2. E. Cas. Ab. 101. 2 1 Vern 57—

But it is doubtful whether a Male Infant can bind his Estate of Inheritance by a Marriage Settlement agreement. tho it has been once ruled that he can bind the estate for life - it is also unsettled whether he can bind his Real Estate - 1 Mont 68 - 9 - 70 - 2 Chan. Cas. 24 - 1 Pow 52 - Stra 604 - 2 P. Wms 229. 43.

It has been said by Lord Mansfield when Chancellor that if an Infant Feme seized in fee Should on her marriage with Consent of her Guardian Covenant in Consideration of a Settlement to Convey her Inheritance to her Husband & it were done in Consideration of a Settlement Equity would Execute the agreement - & altho Lord Hard.k said this was going a great way as it Related to the Inheritance of the wife. Yet he admitted that there were Cases where the Court would go that Length

{2 P Wms 243 - 1 Pow. Con 48. 50

{3 Atk 613 - 15: 1 Br Ch. Cas. 116 -

It is Clear that a feme Infant is not bound by such an agreement unless the Contract was entered into antecedent to the Marriage {3 Bro. Par. Cas. 514 - 3 Atk 56. 1 Vent 70

If a male Infant Covenants in Contemplation of marriage with an exact that he Convey his Real Estate it will be inforced. This indeed is not binding upon the Husbands Real Estate {2 Bro Chan. 544

But it is said that no agreement made by an Infant to Settle his or his Estate will be en=forced unless the Contract be fair Reason=able & made upon adequate Consideration this appears to be the true Rule. Tho Lord Thurlow has said the Court Shall not go into the Competency of the Consider=ation But this is not so- 2 P. C. Mr. 241

1 Pow Con 47. 50- 1 Fonb. 59. 70. 3 Atk 615

If an Infant Capable of disposing of his personal Property by will make a Legacy of his Personal Estate for the Payment of his debts. Chan. will enforce the payment upon the Exr.

1 Eq. Cas. ab. 282. 1. Pow. Con: 37. 1 Ves 403- 1 Fonb 71

It may be enquired how an Infant can Ratify his Contract before he Comes of age as in this Case it seems he must to bind his Exr the ground of this Rule is no where explained- Mr Powell thinks it Perfectly obvious- The Money bequeathed by an Infant tho apparently for the pay=ment of debts is Considered as a voluntary Legacy and the Amount of the debt is

considered to be the Rule by which the Exr is to be governed in the payment of the Legacy — So in Equity a Contract made by another for an Infant may be binding as well as expressly Ratified by the Infant after he attains full age Yet M Gould is of opinion that there is no occasion in this Case for resorting to Equity as a Court Law might with the same Propriety affirm the Contract 1 Atk 489.

The Powers that an Infant is Capable of Executing —

By the word Power as here used is meant an authority delegated by one to another It is generally true that an Infant cannot exercise a Power over Real Estate which requires the exercise of discretion

1 Vs 298. 304. 3 Atk 695. Pow Com Power 44-8

An Infant however may execute a naked or Special Power over any subject. for he who gives the Power admits the Competency Hence there is no discretion to be used by the Infant. who as Lo. Hard. termed him as a mere Conduit Pipe 1 Inst 52. 3 Atk 710-14. Pow C. 42-8

But an Infant Cannot Execute a Power over his own Inheritance. for it may operate greatly to his disadvantage & 1 Ves 306. P. on Powers 43

It is said in 1 Atkins that there is no Precedent either in Law or Equity that authorises an Infant to Execute a Power over Real Estate This is Clearly a Mistake of the Reporter for the exception of the Chan. ought to be qualified by the Rule before laid down (Viz) that he Cannot Execute a gen.l Power

1 Atk 310 same Rule in Ves 304 · P. on Power 43-7-8-

It is a general Rule that an Infant not in trust in the act may execute a Power so as to bind the Principal to the extent of it provided it does not amt. to a direction any Power over Real Estate — 1 Ves 344-5-6

& Pow. on Powers- 43-

An Infant may Execute a gen.l Power over his Personal Property - altho his own interest is to be affected by it. Provided he is old enough to bequeath it by will - but if he is not old enough to bequeath it he cannot Execute the Power & 1 Ves 303- Pow on Power 54-

And where an Infant being tenant for life with Power to make a Jointure upon his intended wife - Covenanted to settle ~~of~~ part of the premises within the Power to the Amt allowed to vest after his death the lands not being of the yearly value Covenanted for - it was decided that a Commission should be awarded to ascertain lands which were within the Power to have formerly Settled to make up the sum Covenanted for - £ 20. 1 Ves 229. Stra 604 - 2 Ver 349 -

There are the Principle and material Powers which an Infant is Capable of Exercising

What Offices an Infant May hold

It is a general Rule that an Infant may hold any Material office the execution of which depends upon Skill and diligence only - but he can in no case hold a Judicial office thus in Eng. an Infant cannot be a ~~Steward~~ Steward Bailiff or Jailor - for Physical Power only is Required for the due Execution of the office - Yet to act in a Judicial Capacity Requires

Remarkable within about three days Oct. 28th 1813 this No. so far shut & nothing but Rain, Snow mud &c &c.

discretion which in legal Contemplation an Infant cannot Possess & 1 Inst 3. 8. 3 Bac 725

& Cro E. 636. Com. dig. Ist. Office 8.3

But with regard to ministerial offices it seems that an Infant may hold them. even tho not himself capable of executing them. for they may be executed by deputy which a Infant cannot 11 Co 4. a. Cro Car 249-556-2 Roll. 153

& Mod 249-3 Bac 72 4-5. 736-8-

Hence according to the Com Law many ministerial offices may be granted to one and his heirs The Reason assigned in the Books for an Infants being allowed to hold ministerial offices is that he may Execute it by deputy Hence it is to be concluded that he can hold none but such as can executed by deputy ——— & Cro E. 636-7-

But an Infant cannot hold the office of an Attorney because it is said he cannot be sworn & 3 Bac 126- note

But the true Reason seems to be that his not of sufficient discretion - Nor can an Infant in any case be a Juror for the

the same Reason Viz he cannot be sworn - but there appears to be a more sufficient Reason - he cannot act Judicially - how he would both hear and determine 6 Mod 32 5. 3 Bac 126

It has already been observed that an Infant at any age may hold the office of an Exe=cutor tho he cannot Execute it

Now as the law allows Infants to Execute certain offices - it therefore binds him by his official acts & of course he is liable for all breaches of his official duty 6 Co 24. a. 1 Lev. 8 Co 44

6 Co. Mow 364 - or 364 2 Mod 272.

Thus far as to the ability of Infants to hold and Execute offices -

How far the Infant is affected by the Non=performance of Conditions annexed to Offices or Estates -

Conditions of this nature are of two kinds Viz Express or implied - by the first Infants are bound like adults - Thus if an Infant ho=lds an Estate to which there is an express Con=dition of forfeiture annexed - the estate will be forfeited upon the non=performance of the

Condition Co Litt 246. c. 2 Ver 160-333-343-2 Leon
Co 21-1 Vent 199. 8 Co 46. Carth 43—

But there is an exception to this Rule which is when the Condition imposes a Penalty or a forfeiture distinct from the Estate the Infant shall not be compellable to perform the Condition - for he might be greatly injured if he were bound by a forfeiture which exceed the value of the Estate gained by the Performance of the Condition - Hence upon Leases to Infants with the Condition annexed that if the rent is not Paid on the day on which it becomes due double the amount the Rent shall be forfeited - This is not binding upon the Lessee - 1 Vent 200. Carth 43
Co Litt 246. c.

But these Conditions may be either express or implied and as to the latter they may be created either by Com. Law or Stat - Implied Conditions at Com Law are subdivided into such as are founded upon the Skill & Confidence of the grantee and such as are not so - The Rule is that by Conditions of the first

Clap in the division Infants are bound - thus if a Stewardship is granted to an Infant in fee he forfeits the office if he mismanages it imth =il fully - tho he is now bound by this Condi =tion as a penalty upon himself { 8 Co 44. C

{ Inst 233-b - Raid 11 - 1 Inst. 8. 3. Co. Cas. 486

But by the latter Clap of Condition Infant can now bound because the grant as in the former Case it is not fiduciary - Hence if an Infant Lepee for life alien in fee he does not forfeit his Estate tho an adult would - 8 Co 44-C. 1. Roll 851

{ 1 Inst 233. C -

As to Condition implied by the Stat. Law the Rule is that when the Stat gives a Remedy against an Infant for non performance of the Condition the Infant is bound by it

{ Plow 364 - 1 Inst 54 - a. Fitz. N. B. 5. 4 -

But when the Stat gives a mere entry and not a Remedy for non Performance Infants are not bound by the Condition for if he were to forfeit in the latter Case he would be liable to lose his Estate by implication - which the Law does not allow of - 8 Co 44 - b. 1 Inst 233. b

1 Inst. 82. 3 -

In What Cases the Stat. of Lim. run against Infants

Infants are equally bound with adults by the Stat.ᵗ of Limitation - unless expressly exempt from their operation - A Stat of Lim. is in the nature of a forfeiture annext to a Right - 6 Leac 31. Or in Chan 518 - Cath 284

And it is said that if an Exᵒʳ or Administrator or trustee for an Infant cannot sue for him within the time prescribed by the Stat of Lim. the Infant is Barred

Mr Gould is of opinion that this applies to those Cases - when the Infant having no such Exᵒʳ Administrator or trustee would not be bound he being saved from the Stat operation & 30. Rm

How an Infant is to Sue & Be sued

And first in what manner they are to sue Infants when they sue must always appear by their Guardian or next Friend who is termed his Procheir-amy - he cannot and cant appear by Attorney - for if he have the Power of making a Power of Attorney surely he cannot appear by one & Doc 225. 280 - 3 Bac 148. Kirby 409. 420 -

If an Infant sues otherwise than by Guardian or next friend - the Deft. may Plead his disabil-ity 3 Blac 309 - Salm 296 - 1 Inst 135 - 6 - 2 ~~Inst~~ 212 Cas 123

Formerly by the ancient Com. Law an Infant (tho' Could appear by Guardian only - but by Stat 12 Westm - he is enabled in some Cases to which are thos of necessity to sue by next friend

3 Cro Jac. 640 - 3 Bac 149 - Salm. 295

The Cases when an an Infant may sue by next friend under the Stat are four -- 1st he may sue by next friend when the action is to be brought against the Guardian. the Reason of which is obvious -- 1 Inst 92. Cro Jac 640 -

2d when the suit is brought agt another Person and the Guardian tho assenting to it will not appear for him - here Mr Pound thinks that the Guardian must assent to it otherwise the suit cannot be maintained. Cro Jac 640

3 Sal. 295. Str 369 - Hil 409.

3d an Infant may sue by next friend where he has no Guardian for to say that an Infant should have no Remedy for an injury because he has no Guardian would be absurd - here

this arises from the necessity of the Case - 1 Inst 135

4th And lastly an Infant may sue by his next friend when Claiming from his Guardian for in this Case he is out of the Guardian's Care & therefore this an exception to the proceeding, is a Case of Necessity & Cro Jac 640 - 2 Bac. 680 -

In all other Cases an Infant must sue by Guardian. Lin Case by Guardian or next friend at discretion - but from the authorities which have been Cited this Cannot be the true Rule - Co Litt 135 - 2 Cro Car 86 - Hutt 92

& 2 Inst 390

When an action is brought by Husband and wife the latter being an Infant she must not appear by next friend but both appear by Attorney appointed by the Husband - & 2 Lord 213

When an Infant sues by Guardian or next friend they and they only are answerable for Cost - & Bac. 680 - Eq Cas. ab. 72 - Str 570 or 506. 1026 -

& 1 Vern 130 - 1 Ter Rep 491 - 1 Mod Rep 60

But according to the opinion of some both the Infant & those who sue for him are liable for

& Gilb Ev. 872 - Plow 298 -

But on reperusing the same case in which this doctrine was laid down - it was was denied to be law - Stra 708 - Cro E 33 - 1 Bul. 109 & 1 Wilk 130 - Mitf Pleac. 26 - 8 Co. 61 - Cro Car 166. Stra 1219.

But an Infant Deft is clearly liable for Costs as well as an adult - for when an Infant is liable to have a Suit commenced against him that in legal contemplation him Guilty of a fault &c - & Stra 1219 Dyer 104 - 1 Bul 189 -

Then has been a Single M. S. case cited to prove that the Guardian on Nurse of an Infant is liable for Cost, as a Rule to this effect is no where else to be found it is to be apprehended that this is not Law & Esp Dig 164

According to the Engl. Practice when an Infant sues by Guardian or Next Friend - they must be admitted to appear by such by the Court or by writ out of Chan[cery] - This is for the Purpose of guarding the Infant from imposition - Stra & 304. 709 - L[d] Ray 132. Palm. 25. Car 216. 3 Atk 663

In Conn[t] when a Suit is brought by a Guardian for an Infant our Courts have never gone into an enquiry whether he is actually Guardian

But a Prochin amy before he can Prosecute must be admitted by the Court for he may be a very improper Person - it has been said that a tacit assent on the Part of the Court is sufficient But it would seem that this is not so -

Ex. 410. 417 -

Any Person whatever can may bring a bill for an Infant as next friend and that without the Infants Consent. but he does it at his Peril so far as it Relates the Costs & the Court will also discharge him if they see fit

Ex Eq Cases. 72. 2 Bro. 680 - 1 Blea 404 -

In an action Brought by an Infant and an adult who are Co Exrs both may appear by Attorney appointed by the adult for they Represent one Person and one being sui juris he may act for both - But if such Exrs are sued the adult cannot be appointed an Attorney nor himself appear for the Infant for the latter can in no case appear as such except as Guardian Ex Cro E. 541 - 78 2 Lands 212 - 13 - 1 Vent 102. 2 Ray 732 - 600. 1449. Str 840

And it has been said that if an infant Ex^r Sues alone he may appear alone by Attorney appointed by himself. but otherwise when he is Administrator. M^r Gould Cannot per ceive the difference. & Coutt. 123. 2 Lamd 213.

& Cro Jac 422. 401.

In what Manner an Infant may be sued

An Infant when sued must always appear by Guardian and not by next friend. Altho an Infant Pl^ff is not liable for Costs yet an Infant Def^t is & Stra 1217. Pash. 225. 250. Hob. 266. 1 Vent 185

When an Infant who has no Guardian is sued. no Judg^t can be rendered against him until the C^t have appointed one pro re natâ. but if the Infant does not appear and suffers Judg^t to go agᵗ him by def^t it is Error & there is no way to remedy it, Judge Reeve says, he may Completely Cheat the Law. When an Infant has a Guardian he must be notified of the suit. yet if this is not done the suit does not abate in Consequence of it. but there must be a Continuance. for Judg^t will not be rendered until Notice is giv en the Court will sometimes appoint a tem porary

Guardian for the Infant when he already has one - but this is in such case only where he is out of their reach and cannot be notified of the action - When Judgt is rendered against an Infant where he does not appear by Guardian it is Error in fact and may be Reversed by a writ of Error not to a higher Court but to the same Court which Rendered the Judgt

If an Infant is sued no one being appointed with the fact of his non-age - and Judgt goes against him by default it is Still Error & the Case seems to be the same when there is a Guardian appointed but who will not appear - there being no Combulsory Process to Compel him to ~~appear~~ answer Judge Reeve is of opinion that the Court in such will appoint a Guardian Pro hac vice - but this is mere matter of opinion - Cro Jac 640 Yelv 58. Cartt. 367

1 Com Dig. 83. 3 Leon 136 -

In Connt it has been ruled in the Supr Court of Errors that in the latter case the Judgt is not Erroneous -

By an Eng. Stat it is provided that if an Infant

dfts appears by Attorny and Judgt passed for him by default it shall not be reversed but Stanx - it appears to be very questionable whether this Stat. which passed in the Reign of Jas. I. would be considered as a Rule for a similar decision in this Country {Cro Jac 441

It is a rule of the Com. Law that if an Infant is sued in partnership with others & appears by Attorney and Judgt is rendered against the whole it is erroneous as to all and will be reversed in toto {Cro Jac 287 - 1 Roll 796. 3 Ter Rep 435

In Commt it has been decided that such Judgt is erroneous as to the Infant only -

Of Legitimate & Illegitimate Children

A Legitimate Child is one that is defined to be born within lawful wedlock or within a competent time after marriage

An illegitimate Child is defined to be one that is not only begotten but born out of lawful wedlock - but if both these definitions are examined it will be found that neither of them are Correct - for a Child may be illegitimate that is born during lawful

wed

medlock as when it is impossible that a man could have accesse to his wife - so when a Child is born out of wedlock it may be legitimate as when it was begotten within wedlock but born after the Connexion terminated and a Child may be Legitimate also that is both begotten and born out of lawful wedlock as when Marriage intervenes and death ex=ists - A Child born capable to the defi=nition of Legitimacy is only Presumptive ly Legitimate - and formerly the Presump tion could only be rebutted by Proof of the impossibility of access of the Husband to the wife or an impossibility to generate

Co Litt. 244 - 2 Stra 940 - Esh. 483. Salk 123.

And anciently at Com. Law nothing Short of the Husbands being, Extra quatuor maria or beyond the four Seas during the whole time of gestation was legal Proof of the impossibility to generate Lovel Cases 395. Esh 483

Ex Bac 310 - Salk 122. 3 - 483. 1 Rol 358

But the Husband having been beyond the fo=ur Seas for any number of years would not

Bastardize a Child born after his Return

Co Litt 224. a.

And the Law is the same when the Husband has been out so long beyond the four Seas - if on the first day of his return - and on the Second day his wife Should be delivered of a Child - for an Enquiry would open the door to such a dangerous retrospection and litigation that the Law will not Suffer it in any Case — & 2 Coll 785 - Salk 122 - 484 -

But this Rule have given away and at length it has been established that Illegitimacy may be proved like any other fact and every is admitted as Presumptive evidence that would operate in any other Case 4 Ves 346

& Esp. Nisi 484. Cow 594

In Comm we have no such Rule as in Eng as being Extra-quation more but we may Consider our Law to be the same as that in England as it is at present Settled -

The issue of a Marriage null ab initio is in all Cases illegitimate -

In the Case of a divorce a vinculo matrimonii

(= nii

for a relationship within the Levitical degrees either by affinity or Consanguinity or Corporeal imbecility - the Issue on such divorce are Bastardized -

In Comm^t. however such Marriages are void ordinitio and the Issue are illegitimate without a divorce -

Formerly in Eng. Pre. Contract was good Proof for such divorce - but that law is now abrogated 6 I Blac 435. Co Lit 235. 7 Co Rep 41. 2 -

The wife is not an admissible witness to shew that the husband has had access to her - for it is said to be Contra bonos mores Still she can prove her own incontinence and Connexion with others which it would seem as much against good manners as the former Case 6 Coo 94 - Buc N.P. 112 - 1 Wood 340 -

The Husband and wife are both admissible witnesses to prove the marriage, the time of & the birth of the Child so also the declarations of either of the Parties disputing the illegitimacy of it & is admissible after their death This is a species of evidence that cannot be had

in any other Case. because it is merely the sayings of a Person not upon oath - so also evidence disputing the birth of the Child or of the time of the Marriage. which is given in a bill in Chan. between 3d Persons may be received {Cow 475 -

Common Reputation is also admissible evidence on this subject as also family Registers and inscriptions on tomb Stones

A divorce a mensa et thoro does not dissolve the Marriage tho it absolves the Parties from Cohabiting together & if a Child is born during their Separation it is presumptive evidence of its illegitimacy. but this Presumption is such as may be Rebutted by proof of a Connexion with the Husband -

But the Presumption is the more where a Child is born after a separation upon articles that this presumption may be rebutted as in the former Case see {4 Ter Rep 356 - 1 Salk 123

{7 Co 12. Stra 925 -

The Eng. Law with respect to the legitimacy or illegitimacy of Children differs from the law

generally adopted in the rest of Europe which Ro
=man or Civil Law - which legitimated all Be
=stard Children by an ex post facto Marriage
of the Parties - This Law Prevails only in Virginia
and there with Certain restrictions - The English
Law being adopted in the remainder of the States

6 Co 56 - 1. Blac. 454 -

A Child born after the death of the father is called
a Posthumous Child - Within what Period
of time a Child born after wedlock is return
ed as Prima facie legitimate or how long
a time has elapsed from the dissolution of the
marriage to make the Infant prima facie
illegitimate is a point on which the books
differ

When a Child has been born so long after the
death of the Husband that it is doubtful whith
=er it is legitimate or not it is usual to have
the opinion of the medical faculty upon
the subject. The usual time of gestation
is 40 weeks - the Circumstances may prolo
=ng it - That every fact must go to the Jury
who are to determine upon the legitimacy

or illegitimacy of the Child — It has once been
decided that when the mother married soon
after the death of the first Husband that a
Child might according to the common course
of Nature have belonged to either — the Infan
t on his arriving to full age might elect
In Eng. when a Child born before the mar
riage of his Parents takes by descent his Fa
thers Estate in wrong of the legitimate Child
born after the Marriage. but if the former
who is called the Bastard eigne is in Possess
ion & dies the latter who is called the Mulier
puisne cannot oust the Issue of bastard ei
gne whose title will be good for this reason
no Enquiry can be made into the legitim
acy of one after his death. & Co Litt 244.
For Authorities generally on the subject of
legitimacy & Illegitimacy see 3 Leav. 110
& Co Jac 541. Co. Litt 123. 1 Bac 312 —
Of the Rights & incapacities of Bastards
The illegitimate Child being called Nullius filius
so far as the Law of inheritance is implicated
can inherit of no body. he having no inherit
able

quality in him 2 Cumb 305 - 2 Ld Ray 68 -
The maxim of Nullius filius is founded it is de
=ed upon the uncertainty of his father - but
this would not prevent him from inher
iting from his Mother about whom there
would be no uncertainty - It appears to be
a Right Rule of Law founded in part upon
the Principle of not disturbing domestic han
=quility which would be the case were the est
ate of the Parent allowed to go from the Childr
=en who were legitimate to a Stranger who is a
Bastard - and part upon principles of Poli
cy. illicit commerce between the Sexes
The Rights of a Bastard are such as he acquire
only - for he can Inherit nothing and as he ca
=n inherit from no one - so no one can in
herit from him but his own immediate issue
for being Related to no body a Relationship
cannot be traced through in the ascending
or descending line 2 Bl. C. 248 -
A Bastard can gain a Sir name by rep
=utation tho he has none by inheritance
And he may acquire an Estate by purch
=ase

But this is to be understood under Certain Re
=strictions - for if a devise is made To the elde
=st son of John Stiles who in fact is a Bas
tard such Bastard Cannot in fact take
for the maxim of filius Nullius Nihil in
and the elder legitimate son will be the
one intended by the devise - and if John
Stiles had no legitimate Child or Illegitim
=ate Cannot take by this gen: discription
Yet this is a Gen: Rule to which there are
some exceptions - for if the Bastard have
acquired the Reputation of being the son
of John Stiles. by Reason of his reputation
tho not by the discription. [illegible] Co Lit 3. Poncui
If an Estate is given in remain [illegible] 319. 338 -
=der to the unborn illegitimate Child of a
man it is not good - for the Law it said will
=l not intend the birth of an illegitimate
Child - therefore the event is to remote and to
suffer such limitations to take Place would
be to Countenance illicit Commerce to take
Place between the sexes which is Contrary to the
Policy of Society [illegible] 6. Co 65. Cro E. 510 - 10 Wm 529 -

It is laid down in Moor 10 - that a devise of Personal Property to all his Children is as much a devise to all his illegitimate Children as to his legitimate Children - but this Case not be Law - for it was a decision of the Spiritual Court - who in this as in the other Cases were governed by the Civil Law - and for this reason the authority Law is, Legitimate Children are Settled in the same Town or Parish where the parents are - but it is a gen[l] rule that illegitimate Children are Settled in the Town where born - {Salk 429 In Comm[n] it has been ruled {1 Bac. 362 - 459 - that the Settlement of the Mother is the Settlem[t] of the Child - But to this gen[l] Rule there is one exception for if a woman is sent by fraud from one Parish to another - & there sues for a bastard Child the Settlement of such Child will be the Place from which the mother was so illegally removed - so if the Mother is sent to Jail out of which Place she is delivered of a Bastard - it's Settlement will be in the Mother's Parish

And if a Child is born of travelling beggar or vagrant its Settlement is in the Mother Parish if any she has - if not 'tis a Stale Bastard -

2 Bl Com 449. 1 Salk 121 - Doug 7 -

At Com Law the marriage of Natural filiation does not hold when the Marriage is within the Levitical degree - so by the Eng. Law if the marriage is to take Place between a illegitim Child and another - Consent of Parents are in all other Cases must be had to make the Marriage valid - But in Connt the Consent of Parents is not necessary to the validity of marriage between Infants - Tho the Person celebrating it liable to a Penalty of twenty Pounds

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Of the Mothers & Reputed fathers liability for the Support of their Bastard Child & the Mode of enforcing that Support

Both in Eng. & Connt the mother and Reputative father of an illegitimate Child are equally liable for the support of it by a Stat. of each Country. The principle Eng. Statu. upon this subject are those of Eliz & Geo. 2. and in all

the States the Sums are similar tho in each they vary. the damages given by the Jury against the Person Charged when they Consider him as the father are one half of what they Consider sufficient for the support of the Child for four Years from the birth

{ Kirb. 26.39

For the Purpose of proving one to be the Father of a bastard Child - the oath of the mother of necessity is admitted both in Eng.d & in Connt. the mode of Proceeding in Connt. is as follows pregnant The Mother on finding herself with a bastard Child applies to a Justice of the Peace or other Magistrate & there makes oath to the fatherhood - a warrant then issues Commanding the Sheriff to apprehend the Person Charged and on such apprehension the Magistrate takes of him a Bond that he will abide the Judgt of the County Court -

{ Kirby 276 -

The Procedure forthwith the form of it being Criminal. tho the object of it is altogether Civil - The Complaint of the woman ~~to the~~

made oath to the Magistrate must be made before the birth of the Child or the Law has remedy entirely. This Construction however is not drawn from the express letter of the Statute but from the reason and Spirit of it But in Eng. it is otherwise for there She may have her Remedy either before or after the birth of the Child } See 1 Swift 211 on this subject } 3 Bac 458.

The Mothers oath is prima facie evidence that the person charged is the father. but the presumption arising from the mothers oath like all other Presumptions may be rebutted by Stronger evidence. but the rebuttal of this presumption is extremely difficult. This Rule bears hard upon the Person accused. yet from the majority of the Case it is and ought to be Law. the damages awarded are collected quarterly by Execution. & if the Child dies before the expiration of four Years the remaining Exs are stayed. so on the other hand if the Child be Sickly & greater Exs arise they are awarded the expences are proportionably increased

Ann Stat not only provides that the Mother sh
-all Swear the Child upon the father but th
-at She shall be questioned when in travail
as to the truth of that oath. Tho the objt
of that oath is wholly Civil. Yet its form
is Criminal & the form of Indict. which ob
-liges the Father to find Security for the da
-mages awarded & if Required to save the
~~Town~~ parish harmless when the Mother belongs
or in Eng. the Parish when the Child is born
And on his failing to find either of these securities
the Court being required - he is to be imprisoned
But neither in Eng. or in Connt. are the Court
sworn of the mother. The Mother must al
-ways have been Constant both in and out of
Connt. in the accusation of the same Person
if She die during her Pregnancy the Putative
father is of Course discharged - And it has been
said that if the Child die immediately after its
birth he is also discharged. But it seems he
would in this Case as in Case the Child had liv
-ed been liable for half the Child. Besides
-es

If the Mother neglects to Prosecute at all. the
town or Parish by the Select men or the overseers
of the Poor may prosecute the father if they can
find out who. and Compell him to give se
curity to Save them harmless
It has become a question whether the mother
is Competent to be a witness — And the Supm
Court of Mass have once decided that She is —
But Judge Rowe doubts the Correctness of
this decision for he thinks that the Contingent
Right which the town may have is not suffi
cient to give them privilege of Prosecuting — and
it may also be a source of domestic discord
which the Law abhors. for the father may
have an amiable and innocent family and
in other respects be faultless. and having se
cured himself from the imputation of being
the father of a bastard Child by a Communi
cation with the Mother — it would seem that the
contingent right of the town which is so rem
ote ought not to be enforced. when it will
operate in such a manifest manner to the
injury of individuals. Yet if Certain absolute

Rights of others however small they may be were to be established - all those Considerations must yield - if the mother dies in Child bed what She has testified at her Examination before the single Magistrate may be given in evidence to the Court — The Jury in this Cause has been before said are not the Judges but the Court and here it is that the Proof loses its Criminal form —

Of the Reciprocal duties of Maintainance of Parent & Child

It is the duty of Parents in all Cases to support their Children - and this duty is founded upon the Law of Nature - for as they by their own proper act have given them Life so it is their duty to preserve that Life — As the Parent is under an obligation to maintain - it remains for the Law to determine how long that Obligation is to continue - and as it is reasonable that the obligation be determined as soon as the Child is capable of maintaining himself

It is settled that the age of 21 years shall be the Period but still if this incapacity continues for

time. This duty of the Parent is not discharged the Rule then is that it is an absolute duty to maintain his Child til he arrives at the age of 21 years & if it is then incapable to maintaining itself. the duty is not discharged so long as such disability continues - before the Child attains full age the Parent cannot in any way put an end to his duty by his shewing his inability to perform it neither can he put an end to it after wards unless he can make it appear that the Child is able to Support itself 1. B.C. 448. 3 Atk 290

& 1 Ves 160 - Br. Chan 268 -

It has been provided by Stat of Eliz in Eng. that parents shall support their Children and in case they are not of sufficient ability this shall devolve on the grand Parents - on the other hand the same Stat. imposes it a duty upon Children to support their Parents - but the Stat of Comm. not stopping here Compels them if their Parents are not of sufficient ability to support their Grand Parents -

The Children Male or male female are dom
=inable

to Support their pauper parents - each to Contribute their proportion But their Contribution is not an equal one for they advance according to their ability and if they disagree as to this the Ct examining into to their respective situation will assess what each shall Contribute — When a man marries a woman having Children whom she was bound to Support that duty is transferred to him & he taking her Cum onere is under the same obligations she was. but no greater. But When one marries a woman who was under an obligation previous to the marriage to support her Parents - The Law exempts the Husband from this duty for the presumption of that domestic tranquility which it so highly Regards. Sam. Thus Reciprocal duties are enforced by an application to a Court of Sessions & when this is done to the Court of Common Pleas - this application may be made by any Person and it will be attended to for Can no Child out of a Number maintain

{ 1 Bla 448

{ 2 Bas 345. Str 190.

ains

his parents alone - he may Recover in the action of Assumpsit against the Remainder thereof -

The duty of Parents & Children to protect each other - It is a well settled rule of Law that a Parent may Justify a Battery in defence of his Child - & a Child may do to the same in defence of his Parent - But this is to be taken in a limited sense - for if a Parent were to Commit a Battery in defence of his Child he would not be Justified in it unless the Child would have been in case he had Committed the Battery alone Hence they put themselves in the Place of each other -

The duty of Parents to Educate their Children - And it is the duty of Parents to Educate their Children to some useful employment - so they must instruct so far as they may be able to Read - Yet the Com. Law of Eng. does not enforce this duty but leaves it to that affection which every Parent is supposed to have for their offspring -

By our Law all Parents are bound to teach their Children to Read to make them acquainted with all those offences which are Capital and to learn them some sound orthodox Catechism

But what Catechism is orthodox is a question whom which there may be as many different opinions as there are different Sects - But this Stat which was enacted when there was but one Sect in Connt had not this in Contemplation - Some how Court have determined that the Catechism shall be such as the Parent himself shall Conceive to be orthodox — As to the Penalty for not Performing either of these duties. the Stat Provides that on failure the Select of the Town shall take such Children from their Parents and bind if a female until it attain the age of 18 years & if a male until 21 to some Master by whom it will not only be taught to Read but to write and also the ground Rules of Arithmetic This Law has been objected to by some as tyranical & an infringement upon Parental rights

But from the good effects it has already had it ought to be considered as good -

Of the Right of Parents to govern their Minor Children -

It is necessary for the order of one's family that he should have the government of it. and of Course that the Parent should have the Power of moderately Chastising & Correcting his Child. The Law when this is not defined nor indeed can it be for it would be impossible to draw a line between moderate and immoderate Correction which would be applicable to every Case for it must depend greatly upon Circumstances - it is agreed that the Correction must be moderate - Hence the question arises what is moderate Correction? - The true ground upon which this question seems to stand - Judge Blackstone thinks it be this - The Parent ought always to be considered as acting in a Judicial Capacity & of Course is not liable for a mere error of Opinion for he acted Conscientiously in an action

by the Child brought agt him for the Battery
no arrest ought to be found against him but
if he acted Malo animo or with an evil
heart he ought to be subject to damages
The motion and the time when the Act
done will alle in mitigation of the intention
& direction of the Parent - these observations
are equally applicable to the Guardian or
master as to Parent 6 I Bac 483 -
The Right of the Parent as to giving and
withholding his Consent to the Marriage of
his Minor Child - Females at the age of 12
& Males at the age of 14 may contract marri
ge with Consent of Parents & by the Stat. 26
Geo. 2nd it is made absolutely necessary to the
validity of a Marriage between Minors that
such Consent should be had. The word Parents
as here used does not include the Mother
when there is a father living - for in a legal
Point of view she has no such Discern
=ment as to give Consent to give - but when
there is no father the Mother stands in his
Place & his Consent then becomes necessary

In those of the United States where there is no Statute similar to that of Geo 2nd a Marriage of minor without Consent of Parents is not void but the Law has laid a Penalty on those who celebrate the Marriage. for which any one may Prosecute —

Of the Parents Authority over the Estate his Chd. As in point of Law an infant is not capable of managing his own Property it is Vested in the hands of his Parents as Natural Guardian who on the Infants arriving at full age must account for it + in case he is guilty of a mismanagement of his trust is liable to be removed from it 1. Bl. C. 452 —

But the Parent is Guardian ex officio if the exemption may be used as trustee of his Child A Parent is entitled to the Labour of his Child while he lives with him and can by him but this is more than he is entitled from Apprentices and Servants —

Of the Parents Right of Action for an injury to his Child — The ground of any action by a Parent for an injury to his Child is

is the Loss of Service & the extreme to which he may have been subjected thereby - but to the Infants money or it is Claimed he has no Claim. That belongs exclusively to the Infant - Esk dig 645. Peak Case 234-

As the Parents right to Recover for a tort Committed upon the Person of his Child is upon the ground of Special damages - such damages must be stated in the declaration and upon the same principle it is that when a Child is entitled away from his Parent an action lies by the latter for the Recovery of damages caused by the loss of Service to which he has already been shewn he was entitled but the value of the Childs labor is by no means to be the rule of damages

So if a female is debauched an action lies by the Parent for the recovery of her Special damages occasioned by the loss of her Service But the real ground of Recovery in this Case is the disgrace reflected on the family and the wound which the feelings of the Parent has sustained - and that this is

the true ground of Recovery is apparent from the evidence which the Defendant may at any time adduce in Mitigation of damages for he may always shew that the daughter was of a loose Character and may prove her connection with other men and this will have the effect of lessening the damages the damages merely nominal - 2 Judge R. is of opinion that this action would lie without the fact of good Service existing tho it would be hazardous to omit it

The slightest degree of service rendered by the Child to the Parent has been considered as good ground even for the highest damages - Dea. Cas 24-55-233

If the daughter live in the Fathers family Service is in all Cases presumed. and it is immaterial whether she be an adult or a Minor - If an adult it is more necessary to shew a Contract making her a Servant de facto - Yet if it appear she live with her Parent merely as a Boarder or being of full age and do not live with him as

action cannot be sustained {3 Wilson 18
But an action can be maintained {2 Fa Rep. 166
by the Parent against the wrongdoer for debauching his Child when she is bound out as an apprentice - here if the ground of the action was the loss of Service the Master must have been the person to Recover the damages - as he is the Person who in fact is injured by loosing that Service to which he alone is entitled — in case the Parent is dead any one standing in loco Parentis may maintain this action {2 Fa Rep Peake Cas 55 -
When the action is by the Parent the delivery is an admissible witness to prove the debauchery — In Eng. the action is Trespass Vi et armis tho in substance it is an action on the Case for the Consequential damages & in Connt this is the form used, Co Lit 338
When the entry into the father's House has been illegal and has Resulted in the debauchery of his daughter Trespass vi et armis will lie ~~tho in substance it is an action on the Case~~ for the breaking and ~~entry~~ entering the

house tho such entry has been frequently giv
-en in evidence in order to aggravate damag
-es - but this whole doctrine of aggravation
Judge Reeve thinks to be an absurdity for it
would seem that nothing ought to be proved
in aggravation for which a Seperate action
would lie Lord Ray 1032 - 1 Ken Blac - 551 - 8 Co. 146 -
It has been a question in Eng. whether an action
would lie for the forcibly taking away a Ch
-ild - and it has been said that if such Child
was the heir apparent that the action would
lie lie - but J. Reeve thinks this cannot
be made a question for an action of tresp
-ass vi et armis laid with a per quod Ser
-vitium amisit would lie for the taking
away any infant Child - and this Justices
independant of the per quod E 3 B.C. 130. 260
The Mother during Coverture has undoubted
-ly an Authority over her Child - but this au
-thority in Legal Contemplation is derived fro
-m the father - who delegates it to the Mother
& who acts in the exertion of it as an agent
But after Coverture is determined by the death

of the Husband his whole Power over his Children devolves upon the Mother and whether she exercises it in the Character of a Parent Guardian or Mistress is immaterial —

of the Parents liability for the Torts of his Child —

Upon the subject of the Parents liability for the torts of his Child — there Remains little to be said for it has already been treated of — at large under the head of Master & Servant — There are some States which render the Parent immediately liable for the torts of his Child arising from his negligence and in some Particular instances for the wilful torts

Of his liability on the Contracts of his Child

It has been seen that the Parent is bound by the Contracts of his Child for Necessaries — But there are four other Cases in which he is bound not as Parent but as Master — they are the following 1st when the Child is expressly empowered to Contract — 2nd when he has a general license to Contract — 3d when the article is purchased Come to the Parents use and

4th by a division in Consd the Parent by the
Contract of his Child when he has a gent
liuue to trade for himself
When a Child is bound as an Apprentice
his Parent is Still liable for the meepanies
for which he may have Contracted
When the Parent is liable for the torts and
Contracts of his Child he is in Law Consid
red the immediate wrong doer or Person
Contracting, and as such in an action the
declaration - declares upon the tort or Con
-tract of the Parent - without naming the
Child !!! — —
Of Infants in ventre sa mere —
The Comm: Law did not originally Consider
a Child unborn ~~(in ventre sa mere) as~~
~~if~~ as in esse for any Purpose but this
Idea has been exploded - that Rule of the
Civil Law taking its Place which considers
unborn Infants as in esse for every Purpose
so much so that on the death of the Parent
it is entitled to a distributive Share of the Per
sonal Estate under the Stat of Car. 2nd

Called the Stat of distributions and if on
the Stat of distribution being made the Ch
=ild being in ventre sa mere were not kn
own or being known was disregarded the
distribution Shall be revoked and a new
one made — And the Case is the same whe
re the distribution is made on the faith of
their being but one Child & there proves to
be two & 2 P.W. 446 - 2 Atth 117 - or 177 -
So when a Guardian is appointed by the fa
=ther for all his Children. such Guardian
is as much a Guardian for the Posthumous
Child as of the others & 1 B.C. 130 - 446 -
And in Case a man dies leaving his wife
Pregnant with a Child which when born w
=ill be heir to his fathers Estate. and waste
is in the mean time Committed a Petition
can be preferred in Chan. by next friend &
an injunction will be granted to stay waste
& Pr in Chan. 150 - 2 Ves 710. -
Hence it appears that the Idea is pretty much
established that a Child in ventre sa mere is a
mere non entity - again it has been determ
=ined

that an unborn Child may be an Executor altho he cannot act as such until he arrives at the age of 17 - so to it has been determined that an Infant in ventre sa mere may take under a Gift for Raising Portions for the Children of the Parent living at his death

P. in Ch. 60-6. 10 Wm 246-342-

And the same Rule obtains in Case a Bond is made in favor of the Childrens Legacy at the Parents death { 2 Fern. 223- so also if made in favor of his Younger Children - And when a Legacy is bequeathed to an unborn Child - it was held on their being two that it should be equally divided between them All these Cases were decided in Chan. and in which the decision were governed by the Civil Law - But it has now been doubted whether at Law or in Equity - but that that a Posthumous Child would inherit to the exclusion of a Remainderman: when the devise was made to a Stranger in Case the testator should die leaving no Child at his death -

1 P Wm 386 - Mob. 3 - 5 - Tu Rich - 60 -

An unborn infant may take by devise. and of this there is no question for when it is consi dered as in ese { Rawon devi 314. Co Lit Note 111 1. Bl Com Rep 463 { 1 Bro Chan Cas. 386. 5. Term Rep 49, 4 Burr 2187

While the opinion prevails that an unborn son was not in ese it was established that kill ing such a Child was not homicide. but a misdemeanor only. Yet it was always held that if such Child were born alive but died within a year and a day after such birth in Consequence of a wounding or injury previously inflicted. the Perpet rator was guilty of Homicide. 1. Hawk. 121

Settlement { 181. 4 B.C. 171 1794

Whereas a Person becomes poor and unable to support himself provision is made by Law for his maintainance. it being in the first Place the duty of the Parent to support him and in case of his disability the duty devolves on the Grandparents or if the Pau per is himself a Parent the duty devolves upon his Children and in case there is no of either of these degrees the maintainance of

Pauper then becomes the duty of some certain district or Corporation - And this district or Corporation is that in which such Pauper is Settled - tho he may be maintained in a district which he has - At Com. Law a Settlement may be acquired in three ways (Viz) by birth - by Parentage and by Marriage - I by birth the Place of one's birth always carries with it a Presumption that such Place is the Settlement ~~of the~~ of such Person & if the father & Mother have no Settlement then in the case of foreign ers the Place of their Childrens birth is the Place of their Settlement - Carr 433 - Camb 361 - But this presumption 1 Salk 485 Lord Ray 567 - that the Place of one's birth is the Place of Settlement may be Rebutted - as for instance by evidence that the father has a Settlement because the Settlement of the father is the Settlement of the Child - It is immaterial when such Child was born - If a man having a Settlement lawfully at A. Person with his

whose family to B. & there acquires a New Sea
=ment the latter is the Place of Settlement of
his whole family for the Settlement of the Ch
=ildren follow that of the father - and when a
new Settlement is gained the old one is lost
1 Salk. 528. 2d Ray. 473 Brown Chan 341 -
If the Father has no Settlement and the Moth
er has as in the Case when a foreigner mar
=ries a Native - the Settlement of the Mother
is the Settlement of the Child without any
regard to the Place of their birth - with Respect
to the Settlement of the Mother when she
marries a man without a Settlement. Contr
ary opinions have prevailed - formerly it was
held in this Case during Coverture she becomes
a Pauper - instead of being a Pauper of the St
=ate She must be Supported by the Town in
which She has a Settlement & of Course her
Children have her Settlement and not the
Place of their Settlement & Bur Settlem.t Case 122
& 367-370-378 -
When a father dies who has gained a Settlement
for all his Children and the Mother obtains

a new Settlement here if she is the maintain
ing Parent and the Child lives with her they
will loose their Settlement of their Father &
obtain that of their Mother - but if they are
apprentices or Minors living with their Guar
dian upon their own Property it is otherwise
It may perhaps be a question whether they
acquire a new Settlement when the Mother her
self is the Guardian and Supports them out
of their own Property - a great deal may be
said on either side - But Judge Cowen is of
opinion that they do - & Bur Settl. Cas. 64-372 -
3d If by Marriage - If the Mother marries after the death
of her first Husband and thereby acquires a new
Settlement for herself the question arises whe
ther the Children follow her Settlement - it
is Clear that they do not acquire a Settlem
in this way, unless the Father in Law is und
er an obligation to Support them - for he is not
then the maintaing Parent - The Gen. Propositi
on laid down in the Books upon this subje
ct - is that Children do not acquire a Settle
ment with the Mother by her Marriage

for this Reason that no man is bound to suppo
-rt the Children of another - This rule appears
to be in Comet - because the reason for it is
false in itself for it is Settled that when
a man marries a woman having Child
ren he is bound to support those Children
in case it were the duety of the mother to sup
-port them as he takes her cum onere and
this she is bound to do unless she is a Pauke
-r or when they themselves are Possessed of Suf
ficient Property for their own Support & 6 Mod
& 387 - 1 Salk 528 - 2 Ld. 270 - 3 Ld. 259 -
These are the gent Com. Law Principles with
Respect to the Settlement of Paupers —
In Comt a Minor gains no Settlement by liv
ing - with a Guardian or Master - for their Set
tlement is with their Parent - But in Eng
it is Provided by Stat - that every apprentice
gains a Settlement in the Place where he last
served his Master 40 days -
But after a minor is emancipated and bec
mes of full age he gains no Settlement
with his Father - by after wards living with
him as a Servant

But otherwise if he Continues with him as bef
=ore in the Character of a Servant & Cant 226-
And when a Minor Contracts a & 5 Tu Rep 583-
a Relation which is inconsistent with Parent
and Child such Minor will not follow the
Settlement of its Parents - as when a female
minor marries She gains the Settlement of
the Husband and loses that of the Father - So
if a Male infant - at the age of eighteen
Joins the army as he may at that age he
while continuing in the army gains no new
Settlement with the Father & Burr Set Cas. 270-
283- 3 Tu Rep 114. 384- 6. do: =252-

No Settlement of the Father ~~affects~~ the Child after
emancipation ~~except~~ in the Cases enumerated
There are Certain Persons who are not remo
vable to the Place of their Settlement - but must
be maintained in Case of their becoming
Chargable at the Charge of the Place of their
Settlement in the Place where ever they happen
to be - as when the wife of a foreigner having
a Settlement becomes a Pauper She must not
be supported from her husband but must be m
=aintained

in the town when his Husband Ruins. So a Child borne as an Apprentice in Case he becomes Chargable he Cannot be Removed from his Master whose duty it is to Support him but he may refuse to do it and is liable only on his Contract - and lastly Foreigners Cannot be removed for they have no Settlement but must be maintained at what ever Place they happen to be at the expence of the State

By the Stat of Connt it is enacted that a Foreigner Shall become Settled in any town by a vote of that town or by a vote of the Civil Authority and Selectmen thereof and they obtain a Settlement of Course in Case of an Appointment to any Civil Office in the town however small - but no acquirement however great will effect this Inhabitants of other States become Settled by either of the above ways or by the Poss in a town of Real Estate of the value of £ 33 1/3 or $ 100

All who are born in a State have a Settlement of Course and may gain new Settlement in any of the ways enumerated and also by Cormorancy for by Remaining in the town Six years without being of any expence to it - this gives him a Settlement

Guardian & Ward

The English Law upon Guardian & Ward does not Strictly apply to any one of the States — It being here found upon Particular Statutes - Yet it will be considered as being in some Instructs analagous as the Root from which our Law Springs -

A Guardian is defined to be one Standing Legally in Loco Parentis during a Childs Minority - altho this definition is not Correct it is as much so as any one that is given

The Subject of Guardianship must be a Person under the age of 21 Years & is denominated the ward - The Guardian has the Charge of both the Person & the Estate of the ward - Tho the guardianship may not be Centred in one Person

The Various Kinds of Guardianship by the English Law will first be attended to And first of Guardian in Chivalry — This is not to be noticed for it is entirely out of use in Eng. & is not known in this Country

2nd Guardian in Soage — This Species of Guardianship exists in some Parts of the U. S. where Lands are holden by Soage Tenure as it is called - Tho it does not extend in gen[l] thro the States. It arises when Lands are Holden in this manner descended to a Minor who is under the age of 14 — the Law having appointed a Guardian for him until he attains this age who must be the next of Kin to whom the Estate cannot by any Possibility descend - for if the Guardian is a Person who might inherit, it is said it would be Committee against ad Custo 6 Rep 164 - Co Litt 88 Note — When there are two who are related in the same degree to the Infant he who first obtains Possession of the Infant shall be Guardian — But this Rule has two exceptions 1st when there two or more half Brothers the eldest shall be preferred 2d when there are two or more half Sisters the eldest shall be Preferred 3 if the Infant has several ancestors in equal degree the Male

shall be Referred to the Female & Co Litt 88 Note B
This Guardian extends to both the Person & Estate of the Infant & Co Litt 89 –
Guardian in Socage is a trust which is not assignable & Co Litt 90 Plow 293 –
And in such Case on the Infants attaining the age of 14 Years he may then entre upon the Estate & oust the Guardian & if he Refuses Com shall him to account
In Eng. a Parent has a Right to appoint a Guardian who will succeed all other
A Guardian in Socage may exercise any act of ownership for his Dominus pro tempore and may in his own name grant Copyhold Estate & may also enjoin the profits to his own use tho he shall account for them
& 2 Dan 683 –
3d Guardian by Nature, this Kind of Guardian is more extensive in its Situation than either of the four mentioned – at Com Law it extends only to the Person & the subject of it is only the time this Guardian ship belongs in the first Place to the Father –

& on his death it belongs in the 2d Place to the Mother & in case both are dead it belongs to the next of Kin without any Restriction

By the interposition of a Court of Chancery the Guardian by Nature may be & frequently is constituted Guardian of the Estate as well as Guardian of the Person of the ward—

It would seem that in this Country the Court is as much Guardian by Nature to all his Children as to any one of them in Particular for one is as much his heir as another. Hence there can be no distinction—By a Kind of Com Law of our own in this Country it is established that a Guardian by Nature is as much Guardian of the Estate as the Person of the ward & this without the interposition of Chancery—

This Species of Guardianship like all others is suspended by the appointment of a testamentary Guardian Co Litt 84-8—Cruth 286——

4th Guardian by Nurture

The subjects of this Species of Guardianship are those only who can not be heirs

Hence in this Country there can be no Guardian of this discription - all being heirs one equally with another

5th and lastly Testamentary Guardians

Whether there can be any testamentary Guardians in the U.S. debates entirely upon the State of each State for this shews of Guardian is a mere (Shews) Creature of the State & of Course entirely unknown to the Com. Law In some of the States there are Stats. & in some there are none & this last is the Case in Connt

A Testamentary Guardian by the English Stats may be Created either by deed or by will by will it has been denied when the father was of the age of seventeen & by deed it would run at the same age for the form of the instrument is very immaterial when its operation is the same —

And a deed of this nature has the same operation as a will because it does not have effect until the death of the maker & until that 'tis ambulatory & may be Revoked

{1 Blac 462 - Co Litt 89 —

A Testamentary Guardian cannot assign his
trust for it is personal & in case he dies
or refuses to take it upon him it must fall
into other hands but having once once
taken that trust he can never Relinqu
ish it { 2 Atk 14 —

The Minor has in Eng. in certain circum
stances a Right to elect his Guardian. when
the Law has appointed none for him yet
he cannot do this while under the
age of 14 - because in case he holds Socage
Lands he has one by Law until that Period
so if he be heir apparent he has a Guard
ian by Nurture — But if this were the
case when all his heirs - the Infant would
be forever debarred of the Privilege of El
ecting his Guardian & hence it is that his
power of Guardianship is not admitted

{ Co Lit 87 - 1 Ves 374 - 6

In Eng. the Minor Elects his Guardian in some
Circuit Court Either by parol or in writing
& is either approved or disapproved as the Judge
sees fit — The Male Elects his Guardian

at the age of 14 & the female at the age of 12
But if an infant neglect to Elect his Guardian & none is by Law appointed 'tis the duty of Chan. to nominate one & 1 Vern 703. 8 Mod 214 - Co Litt 84 - 1 Vern 160 -
The Ecclesiastical Courts have likewise appointed Guardians. But this Power now seems to be taken from them & 2 Lew 162. 3 Keb 38 - 3 Bun 1496 - 3 Atk 631 -
6th Guardianship ad litem is created when an Infant is a suit in a Court without a Guardian & one pro tempore is appointed by the Court who is stiled a Guardian ad litem - And the Power of appointing a Guardian of this Nature is incident to every Court & Co Litt 89 / Note 03 / 35 - 53 -
At Com Law this Species of Guardian is not known - for this Reason the Court is of itself considered the Guardian ad litem and may be appointed in Eng. by Letters Patent under the great seal & the Power of such Guardian is not confined to one suit but this practice now pretty much gone into disuse
Co Litt. 8. Note. -

There are the particular kinds of Guardian cognizable to the English Law, those known in the U.S. will next be considered —

In the U.S. there are no Guardians in Chivalry & Probably but few in Socage for there are but few upon the principles of our Law who are of Nin & Cannot in knit & none at Com. Law by testamentary Guardian — being entirely Regulated by Statutes of the Several States —

The Court of Chan. here have not the Power of appointing Guardians tho this may be the case in some of the States in the union where the Chan. Powers are more extensive than in Connt. Neither do the Ecclesiastical Courts interfere in the appointment of Guardians for they here have no Power

The Guardians that are exercised in the U.S. are Guardian by Nature Guardians appointed by the Courts of Probate & in some of the States Courts of Chan. and ad litem

And in the first Place Guardians by ~~Statute~~ Nature which here differ from the same kind of Guardianship in England in this

Guardians by Nature is not to be confined to one Person because the same Reason does not exist for it more but the heir being subject this Kind of Guardianship but has each Child being equally the heir one with another each is equally liable to have a Guardian by Nature

By the English Law a Guardian by Nature has the Control of the Person of the ward only - But here he has both the Control of his Person & Estate while the father is living he is Guardian by Nature over his Children until they arrive at full age - Tho as to the Latter liable to be remove d by any Court having Authority therefor, and this Court in Eng. is the Court of Chan. & here the Court of Probate - In Case of the fathers death there is some confusion in the Book who shall be the Surveyor - By the Com Law of Eng the Mother clearly is & Judge Reeve thinks it to be the case here after she is confi rmed by the Ct of Probate - But she is liable to be removed from the Guardianship of both the pe rson & Property of the Child - which it has also

=ady

law seems that the father is not excepted as to the latter - Neither is she entitled like father to the service of the Child - unless as the case may be she maintains it -

When there is neither father nor mother the next of kin by the Engt Law who cannot inherit is the Guardian - but here nothing of the kind prevails in practice for it rests entirely with the Court of Probate to appoint whom they please - As to the age of electing Guardians it is agreed that in Males it is 14 some say 'tis the same with females - But in females as the age of Matrimony is fixed at 12. it would that preserve the symetry of the Law this ought to be the age for electing a Guardian - tho in Connt this is left to Regt by a Statute provision fixing it in Males & females at the respective ages of fourteen & twelve - When the Minor is under the age of electing the Guardian is appointed by the Court - & his office is to continue until the ward becomes of full age. liable however to be superseded by the election of a new Guardian

by the infant when he arives at the age of 14
hence it appears that a Guardian appointed
in this manner continues Guardian to the
Infant 'till the minority of the Infant is
terminated unless Removed by the Court or
Choice of the Ward — The Ward has a right
in all Cases to live with the Guardian and
cannot be removed from him of Course he
can gain no settlement by such Residence
but there is an exception to this Rule for if the
minor has a father alive & has also a guar
dian over his seperate Property he must in
such Case remain with the former. becaus
the father cannot be divested of his Power over
the Person of the Child. But not so with
the Mother when the father is dead for
for She has no Power over the Person of the
Child unless particularly vested with it

A Guardian must when appointed in all
Cases when the ward has an Estate give bonds
for the faithful performance of the Trust
When a Minor is of the age of Electing the
Probate will not appoint a Guardian for

him until such minor has been summon-
-ed to make a Choice - The Guardian is liable
to account either before or after the Guard-
ianship has terminated & this in Eng: to a
Court of Chan. which will sometimes for
the greater security of the Minor. Compel
him to account annually & this may pos-
sibly be the case in some of the U. S.
Tho there is no doubt but in all the States
they are compellable to account before the
Court of Probate

This action of account would lie at Com. Law
agt the Guardian in all cases 6 Co Litt 89-
But that it will lie after the ward comes
of age there can be no question 6 Bac. Abr. 463
2 Bac 649. 689 — Co Litt 88 —

In Eng it is usual to pursue this action in
a Court of Chan. as the most Remedial
& Judge Reeve knows not whether there is
any thing in Connt that prevents a Bill
being filed in Chan. Tho it is not actually
done for the Com Law giving him action it
is now a remedial to pursue the action in a
Com. Law Ct

The appointment of a Guardian is presumptive evidence of his being Bailiff of the Ward. but this presumption may be Rebutted by evidence that he is not Guardian for he might not have entered —
The Stat. of Comm. provides that he shall be compelled to account before Auditors who are empowered to examine him upon oath & if he refuses to swear they may commit him for contempt or if he neglects to appear at Sessions will go agt him for the whole sum demanded unless it appear that he then is no need of Resorting to Chan — for the Comm Court can Compell him to account as often as they think proper —
{2 Mod 177 - 2 Bac 279 —
It has been said that Guardians may be removed & this is done when there is ground of suspicion of his fraudulent conduct when he is a Bankrupt or when he is in failing circumstances {10 Vin 403 - 1 Ves 160 - 1 Salk 44 - 2 Mod 177 —
The Guardian (except when he is father)

is not bound to support the wife as his own
children. but he must supported out of his
own Estate so when the father being possessed
of a moderate Property is the guardian of
his Child who has a devise to him of a large
Estate & by this means is entitled to better
Education than is in his ~~Power~~ father's Power
to give him Chan will intend & allow
the charge of it to be defrayed out of his own
estate 6 Brown Chan 36-71- Ves 163. 3 Atk 309-
If the woman is the natural Guardian of
the Child but without any Judicial appoint
ment marries, a question arises whether
her husband is bound to maintain such Child
& the decision on this point are contradictory
but it would seem that question would ad-
~~of~~mit of but little doubt- for if the mo
ther previous to her marriage was liable to
support her Child - the duty after marria
ge devolves upon her Husband in pursuance
of the well established maxim that he
takes her with her ~~encumbrance~~ but if she
was a Pauper it is equally clear that he is

under no obligation & it is not to be such
and that the Marriage of the Mother can
-prive the Child of his Maintenance which
previously he was entitled to & throw the bu
rden upon the Public - {1 Ves 160. 1 Bro Chan 268
2 Vent 361 ———

As to the father's right to Educate the Child
when such Child has an Estate of its own it
is settled — But Lord Hardwick has said that
it shall be Regulated by a Court of Chancery
& if this is true the Power him is vested in
Court of Probate {2 Vent 313. 2 Vern 197. 2 & 5 —
3 Atk. 399 — 1 Ves 160 —

When an Infant is Mortgagee & the Mortgage
is Paid off his Conveyance of the deed is by the
English Law good on the Principle that what
an Infant is Compelled to do may be volu
tary performed & the act be binding {3 Burr 1794
The Stat of Connt. not only Permitted this Con
veyance by the Infant but extended the same
day & enabled the Guardian to do it. So in
Eng an Infant Tenant in Common may
make Partition for he is Compellable to do it

And in this Case as in the other the Infant may not only do it but his Guardian may also—

The Chancellor in Eng. is Guardian paramount to all others in the Kingdom and as has been said may displace them at Pleasure but this Power must be exercised with discretion — The Chancellor also exercises a further prerogative for it is his duty to take Care of & protect the ward — he will see that the Guardian does not make use of the wards property to his own advantage & if a debt is owing from the latter & the former compromises with the Creditor who takes less than his demand — the ward & not the Guardian must have the ~~cent~~ benefit of the discount 6 I Chan Cas. 245 - 2 Com. Dig 230—

When the Guardian Receives money from the ward it is his duty to take Care of it in the safest & most advantageous manner. he may put it in the funds if the Bank be of the most established Credit or he may put to private Interest upon good security—

But if he keeps it in his own possession how
ever prove that he could not improve it to the
wards advantage— The Guardian is not at
liberty to expend the wards money in the pur
chase of new property & if he does the latter
on his arriving at full age has it in his Elec
tion whether he will take it or the sum ex
pended in the purchase with the Lawful In
terest & if he elect the latter Chan. will
compell him to convey the Land to the Guar
dian who purchased the Land in the name of
the ward {2 Ves 625 — 1 Ves 435
In case the money of the ward is put into
trade by the Guardian the former may eith
er elect the principal & Interest or the profits
of the trade & if he take the latter he can co
mpel the Guardian to account for them on
an oath {2 Ves 625 —
And in gen[eral] he must account for the In
terest unless he can shew that he could not
prudently loan it {1 Dum 629 —
When Real Estate is purchased by the Guard
ian for the ward who dies the heir of the m
=inor

has not his election which the Minor himself would have had he lived for the principal & interest must be paid by the Guardian to the Ex^r of the ward for the benefit of his Creditors & the bill must convey to the Guardian in which it appears that in Chan. the Guardian is considered as trustee of the ward who must have the full profits of his estate The Court of Chan. will in some cases consider the wrong done as a Guardian to the ward When one an Infant the Court may be moved & the Instrument moved against as a Guardian & will be compelled by Chan. to account for the profits as trust to the ward 1 Atk 489 – 1 Vern 486 – 2 Bac 687 – 1 Ch. Cas 280 –

The Guardian as a trust of any must dispose of the Personal Property of his ward If the Property is of a durable or of an improvable Nature it may be kept – but if of a perishable nature it must be disposed of Some regard ought to be paid to the inclination of the Infant with regard to the disposition of the Property If he chooses to pursue the

wearing apparel of the wards &c— family
pictures are not be sold —

There is one kind of Power which is exercised by
Chan. in Eng. which cannot be enforced here
And this is with Respect to the Marriage of the
ward If the Guardian refuses his assent to the
marriage of the ward. Chan. will forbid the
Marriage & in case the Prohibition is disre
garded the ward will be committed for a Contem
pt of Court — but they will go further
the Court will Refuse their assent even wh
en the Guardian has no objection

6 Johns. Cas. 38. 1. Ch. R. III. 567 —

And if there is a well grounded Suspicion of
of the disparagement of the ward by the Mar
riage ~~of the ward~~ when the Guardian comes
into Chan will take the ward out of the
hands of guardian 3 Atk — 304 - 8 — —

The Assent of the Marriage of Minors

The Assent of marriage between minors is now
to be Considered & first of Female Minors
when a female ward marries the Guardian
which ever he Ceases both to the Person & his
Purity

for the Husband must have the Control of her Person & if an adult of her estate also & if he is a minor then can be no question but that he has the same right to her Person as if he were an adult — And surely her property is as much transfered to him by the Marriage as it would be in any Case —

2 of Male Minors when a male ward marries his Guardian loses all control over his Person for the Relation he has Contracted is wholly inconsistent with it but he retains the

of his Estate & not only of his but of that which he acquires by Marriage the Property of the minor wife in this Case being transfered from her Guardian to the Guardian of her Husband — — — {& thus Ennuth Guardian & ward

Executors & Administrators

An Executor is one appointed by the Testator & whose business it is to dispose of the testators Estate as he has directed in his will & conform himself thereto as far as is agreable to Law—

An Administrator is one who on defect of a will is appointed by the ordinary to administer on the effects of the intestate & whose duty differs not materially from an Exr
The one is to distribute the Estate according to the Last will of the deceased & the other according to the Municipal Law. independant of any will Expressed by the deceased—

Property is divided into Real & Personal Real property on the death of an intestate immediately vests in the heir or heirs he or they being Pointed out by Law Except indeed in the Case of fee tail the donor Points out the Particular Person

heir or heirs in whom the Estate shall
vest — Personal Estate does not like
Real on the death of the intestate an
=cestor vest in the heir tho when the
ancestors debts are Paid the Law Points
out Certain Persons who shall have
the Residuum but such Estate Rests
in abeyance until an administrator
is appointed in whom the legal title
then vests tho the equitable one is in
the Person or Persons Pointed out to
Receive the Estate — An Administra
tor being Considered as a trustee for
the Creditors & for them as in an Exr
for the Creditors & Legatees of his testa
tor. a Sale by either to bonâ fide pur
-chasers being valid
Real Property on the Person intestate
dying in the Devisee the Personal in
the Exrs & not in the Legatee till he
has assented for this Property is first
liable to Creditors thereon if the

debts exhaust this fund the Legatees can take Nothing their Right being defeas=ible on their being a deficiency of ass=ets without the Legacies and it is to be remembred that Creditors are al=ways to be Preferred to Volunteers & Credi=tors for a valuable Consideration to those for a good Consideration. tho the latter are Specialties & the form=er Simple Contracts Creditors & in Case of a deficiency of assets without taking upon the Legacies. those which are gent & Pecuniary are first liable they being exhausted the Specific lega=cies are to be taken but the debts not Requiring all the Specific Leg=acies the Ex=r may apply which of the=m he Pleases for the Purpose of pay=ing the debts & need not Pay them out of a Proportionable part of each as he must if he do not exhaust all the Pecuniary Legacies

the Chancr. will perhaps when the legacy of one Specific Legatee only has been taken for the debts - Order the other of the Specific Legatees to make him a proportionable Compensation - but when there proves to be a Sufficiency of Assets for the debts & Specific Legatees and also a ~~Residuary~~ Residuum the Exr. must disbose of the Residuary part to the Residuary Legatee -

But the testator having pointed out no Residuary Legatee - the Idea formerly was that the Exr. having the legal title should have the residuum he being a trustee for the debts & Legacies only & this is still the legal Idea but Chancr will now interfere & let the intention (which is the Polar Star in the Constitution of wills) govern - therefore if the Exr. has a Legacy or is otherwise notified by the testator in such a manner as to Rebut the presumption

that he intended the Residuum for him it shall go to the next of kin according to the Stat. of distributions - but if he is not taken Notice of or even tho he be in such a manner as not to Rebut the Presumption that the Testator intended he Should have the Residuum he Shall have it

If a man dies indebted to near the amount of his Personal estate now but the Specialty Creditors have a lien upon the heirs & in this particular the Engsh Law is surprisingly defective - for by this Law the heir may wallow in Luxury by means of an Estate from their Ancestor whilst Simple Contract Creditors of the same Ancestor may be starving - may be dying with hunger for want of those debts which in Justice & honesty they are entitled to out of that Estate* - but England is the Nation who loudly boast of their Civil Rights & Privileges

* grand laws !!!

If a debtor dies leaving a deficiency of assets
Personal - there being Specialty & Simple
Contract Creditors - the Specialty Credit
=or may Come if he will upon the Heir
In having assets from his Ancestor &
leave the Personal Estate for the benefit
of Simple Contract Creditors - but if
they Please they Can Come upon the per
=sonal assets & utterly debarre the Si
=mple Contract Creditor of any Reme
=dy at Law - But here Chan[cery] will in
=terfere & let in Simple Contract Creditors
so far upon the Heir as the Specialty
Creditor might have gone & if this allo
=wing them to Come upon the Heir will
not satisfy all their demand - they
must average their Loss for they have no
further Remedy -

But at Law Creditors do not aver
=age the Property on which they have a
lien - but he who first Commences
a Suit (provided there be none of a higher
degree)

is entitled to his whole debt if there be ap
ets Sufficient tho all the other Creditors
be deprived thereby — It sometimes hap
=pens that Englishmen are honest even
unto as they are about to leave this sub
=lunary world & do by will appoint
hunters to Sell their Lands & out of the
avails to pay their debts — This does
not vest the fee in the hunter as Ex^r
but is merely a Power of Attorney en
=abling him to Sell his Lands & out of
the avails to pay his debts & if the hun
=ter delays to Sell the Lands Chan^y will
a Sale & if the avails do not amount
to all the debts. average them among the
Creditors in proportion to their debts.
But if the ~~average~~ avails amount to
more than the debts they will be
distributed according to the Stat. of
Car. 2 qualified by that of Jac 1. unless
indeed they go to the heir as in the Case
when the Personal property is Sufficient

to assume all the debts. for the Eng^{h} (Constitution) Construction is that the tes=tator willed his Lands to be sold for the payment of his debts on the supposition that the Personal assetts are in=sufficient & that he meant not to deprive his heir of the land on any other Contingency - But this is many times I presume a false Construction & would not in Com. be followed - It not being here Settled by a Judi=cial decision - For may not a testator (in Eng^{d} particularly) when the eldest son takes all the Real Estate) have acted from the motives that his heir would be well provided for tho his debts were Paid out of his Real Estate & that otherwise his wife & Younger Chil=dren would be badly provided for

Specialty Creditors have no lien upon the heir or his personal proper=ty. They Can make him the nominal

defts the Judgt - Upon only against those Lands which he had from his Ancestor who Contracted the debts - Therefore the heir to evade the debts would frequently Sell the Lands & thus deprive the Creditors of their debts for they Could have no lien upon the Lands when in the hands of 3d Persons or a bona fide Purchaser - to Remedy this evil the Stat of Wm & Mary (Ch 14) was Enacted that on Sale by the heir Judgt Should Issue against him personally —

Simple Contract Creditors when they are allowed to Come upon the heir & Recover their debts by filing a Bill in Chancy Relating the Circumstances of the Case - Chancy will then order the heir to pay those Creditors to the amount of what Special Creditors might have Come upon him & in default of such payment they

are afterwards to come upon his Patrimony

Under the Law of Connecticut

Altho the Genl Rules & Maxims are the same as under the Engh. Yet the Law By our Stat. differs materially from the English - In Conn. the Real as well as the Personal Property is liable for the debts of the deceased - tho by the express words of the Stat. the Personal must be exhausted before the Real can be taken. The Real Estate does not vest in the Exr or Administrator - but on a deficiency of personal estate - under our Stat - either have the same power over the being granted by the Court of Probate to Sell the deceased, Lands that in Engd a trustee or Exr has by will

2d - When there is a deficiency of assets we like Chancery pari passu all debts being put on an equal footing with Simple Contract debts with the single exception

of Physicians & nurses last Sickness bills which are preferd to all others - & this principle must ever be held inviolable - on the death of an Intestate or Testator - in the former the estate vests in the heir - in the latter in Devisee But in both cases the estate is liable on a deficiency of Personal assets

Assets may always be pursued 'til they get into the hands of 3d Persons for a valuable Consideration; to being a bona fide purchaser — Suppose an Exr or Administrator not Regarding Creditors Claims the assets - the one by paying Legacies the other by distributing to those pointed out by Statute - in this case the Creditors must first come upon the Exr or administrator on their inability to the Bondsmen & upon the bondsmen inability upon the Legatees, or those to whom the Estate is distributed they being volunteers

Of the Maxim that "a Creditor by appointing his debtor his Exr Extin=guishes the debt"

This maxim was formerly understood literally for it was considered absurd that an Exr should sue himself & no other person could sue for the debts due to the testator. therefore the debt was considered as extinguished — the first Step in derogation of this Rule was that the Exrs debt should be considered as assets in his hands for the payment of the testators debts & this on the ground that Creditors should always be preferred to volunteers, the second & last innovation upon this maxim is, that it shall be liable as assets for the payment of Legacies — on the principal that the intention of the testator is to govern & it is considered more Reasonable to suppose that the testator meant to benefit the Legatees whom he has

expressly mentioned than that the Exr
whom he has passed over in Silence should
be benefitted by mere operation of Law
The debts & Legacies being paid he holds
the debt or Rather the debt is extin-
guished because he is entitled to the Residue
:uum for the idea is alone enough that
the debt is extinguished because he can
not sue himself for the same reason
would operate to extinguish the debt of
an Admr which has never been the case
& as he is now considered as entitled to
it
on the ground of being entitled to the
Residuum it is very questionable
(tho there has been no such decision)
whether when he is obliged to distribute
the Residuum he would not also be
obliged to distribute his debt also—
{ Roll 9 20- Plow 186- Yelv 160- Lw 370-
{ Lut. 293—

Who May be an Exr & Who may or
Must be an Admr

It seem that a person may be appoin
ted an Exr who has Competent understan
ding - A Bankrupt a villain in fact
=ual times an Alien in autre droit
a person having no other Right Whatso
ever — But if a Person not having
an understanding adequate to the per
=formance of the trust is appointed
he may be dischard. So if having
an adequate understanding at the
time of appointment & afterwards
become non Compos he may be
dischard & in both Cases an Admr
be appointed - Formerly no such per
=son as admr was known from what
we Can gather on the subject - a Certain
part of the intestates estate after payi
ng off the debts went to the wife a Cer
=tain part to the Children & the Remai
nder was appropriated to pious uses

the Care of all dead mens estate was the Prerogative of the King. he being Consider=ed by the Com. Law as the parens patriae but that one man should take Care of all dead mens estate in the Kingdom it was impossible. Therefore the trust was delegated to Ecclesiastical Persons who were supposed to be the most proper to have the Reaching of the Kings Consciens - this trust they most shame=fully abused (as they generally do all other trusts) they being accountable on=ly to God - who gives long Credit & to their own Consciences which they were and now are ever ~~dishonest~~ Ready & most fully disposed to Cross out their own Offences — By their abuses of the tru=st Creditors were unpaid - & Widows were left destitute & Posterity - children in=nourished & unprovided for & the esta=te of the intestate is devoted to their tru=st, intrigues & antichristian institution

while their Return was in prior Requir
ements & masses for the Soul of the deceas
ed — Tho if Belzebub had them one in
his Clutches they might Pray & mass
him to all eternity without effect —
To Remedy these Flagrant abuses the
the Stat. 31. Ed. 3. Provides that in Case of
intistacy each Bishop in his diocese
Shall appoint the next ~~of Kin~~ friend to admin
ister the goods of the intestate. who
shall at all events Pay the debts of the
intestate if there is a sufficiency of
assets & this Admr had their origin
In the Construction of this Statute
next friend was generally Considered to
mean next of Kin to whom admi
nistration was generally granted tho not
always — A second Stat. 21 Hen. 8. enla
rges a little more the Power of the Eccles
iastical Judge this in declaring that the
widow or next of Kin shall be appointed
Admrs & one of them two persons must be appointed

Under this Stat. a practice was continued (which probably was introduced under the former tho that was virtually Repealed by this, but that is now Repealed) it seems not to have been adverted to of appointing the husband admr to the wife when She died Possessed of a separate property tho the Stat gives no such Power for that said administration should be granted to the widow or next of kin — In Connr we have a Stat a Copy of that of Hen. 8th under which the same practice of appointing the Husband Admr has been followed & whether we have any law Authorising the Practice may be made a question — Yet I conceive that our Courts it being of so long a Standing would not if the question were agitated overturn the Custom — But in Eng. the question was legalized by a Stat. Car. 2d tho that

Stat Can be of no effect here it being
subsequent to the time down to which
the Engl. Stat. have any force here
2 Blac. 476-502-

In the Construction of the Stat. Hen. 8th
(of which ours is a Copy) it has been
determined that administration m-
-ay be granted to the widow or next of
Kin or both at the Election of the ordi
-nary 1 Strange 557
or that administration of one part
of the Estate might be granted to the
widow & the other to the next of Kin
thereon if the may be admr. of
the whole Estate. they may be Joint
admrs or they may be admrs in se-
-verally- 1 Roll 908

So when there are more than one next
of Kin (as there may be technically sp-
-eaking) the terms next of Kin are not
considered strictly nomen Collectivum
that all of the next of Kin must be

appointed. but all or either of them may be appointed. but a preference by usage (not authorized by Stat) is given to those who are next of kin in the first degree in the descending line to those of the same degree in the ascending —

The whole Blood are no more entitled to the administration than the half Blood. Therefore the ordinary may if he pleases grant administration to the sister of the half Blood in exclusion to the Brother of the whole blood

2 Blac. 505 —

If the next of kin is an infant the ordinary may at his Election grant administration to some proper person durante minore aetate

2 Vesey. 251 —

The in Eng. the ordinary is to ~~grant~~ appoint an Admr durante minore aetate if the person entitled to admr

is under age - Yet in Comm^t it is the
practice to appoint the next Relative
absolutely - If neither the widow or
next of Kin will take out adminis
stration it seems established that a
Creditor is entitled in preference to
any one else - But if no Creditor
Comes forward he may grant adm
inistration to some distant Person at
his Election
If adm^r dies before he has Executed
his Trust. the Ordinary may at his
election appoint administrator
de bonis non - Sometimes when
there is a will it is necessary to app
oint an administrator - If a will
is made & no Ex^r is appointed the
ordinary must administer to some
Person at his Election
So when the Testator has appointed an
Ex^r under Seventeen years of age an
Ex^r both in Eng^d & in Com^t being inca
pable

to act under that age - an Admr. dur
=ante minore ætate must be appointed
at the election of the ordinary an Admr
cannot act neither in Eng. nor Connt.
until the age of 21 years & it has been
questioned whether an Exr in Connt. can
act until he is 21 years of age. because we
have a Stat declaring that all Exrs
shall give bonds faithfully to disch
arge that trust - tho it is in Genl the
Rule opinion that Infants may in
Connt be Executors at the age of 17 - & that
their Bond in this Case would be valid

A Brother or any male next of kin
will be preferred to females of the same
degree who is married & an woman
=ied female will be preferred to a mar
=ried one in the same degree -

Of the duties of Exrs & Admrs

An Exr & admr being appointed the
former by the testator the latter by the
ordinary (in Connt. by the Ct of Probate)

their duties are materially the same both are to Pay the debts / an Exr only Can have Legacies to distribute / & both are to distribute the Residuum the Exr himself not being entitled to it ..

But there seem to be no Reason to Conclude that the Exr shall be entitled to the Residuum in any Case in Connt for he is here entitled to full satisfaction & wages for his labor & trouble - the true ground on which he is allowed to hold it in England being that he would otherwise have no Compensation for discharging the office he being there entitled to no wages - So an Administrator being entitled to wages is in no Case entitled to the Residuum - the maxim that the will of the testator must govern must be thus qualified that it must ever govern provided the intention was not to do an act Contrary to Law

Tho the Husband as such is not entitled to the wifes Choses in action on her death yet as admr he ~~is~~ has in Eng. a right to Retain them after Payment of her debts for a Stat subsequent to the Stat of Car. 2 has given a husband as administrator to his wife which he is always entitled to be a Right of retaining his Personal Property after payment of her debts - Placing himself on the same footing that all administrators were before the Stat. Car. 2d

But in this Country the Husband has no Right to Retain the wifes Choses in action because he is to be admr -

So it has been determined in Massachusetts. Tho the same has been pretty generally Considered otherwise -

Of the distribution of the Residuum by the Administrator -

Tho the Engl Stat. on this subject are not Law in this Country yet

many of the Neighboring States have
Coincided them with more or but slig
ht variation. But Connecticut whose
Stat. differs more materially. the ge
nt Rules & Maxims on the Subject
are the same & that after the debts
are Paid the Admr. Shall according
to the Several Statutes in each Plan
their Remaining Assetts in his hands
distribute them

In Engd agreable to the Stat 22 & 23
Car 2nd the deased intestate leaving
a wife & Children 1/3 Shall be distri
buted to the wife & the other 2/3 ds to the
Children equally & their Legal Repre
sentatives - Their being no wife the
whole to the Children & their Legal
Representatives - Their being no Chil
dren one Moiety to the wife & the
other to the next of Kin & their Legal
Representatives - And to determine
who the next of Kin ~~their Legal Representatives~~ are

the Computation of the Civil Law is followed - the intestate being by that the head or Common Stock from wh=om the Several degrees are numbe=red - the Civil Law method being fo=llowed in Comm^t — So long as there are any Children or issue the next of kin are men to take - the descen=ding line are always to be preferd to the rest of kin in the ascending or Collateral line - And it is mate=rial to Remember that in the descen=ding line Representation lasts ad infinitum - But in the Collateral line no further than Brothers & Sisters Childre=n - & when all the Claimants sta=nd in equal degree of propinquity they take Per Capita & each one in his own Right - but when they take by Rep=resentation they take Per Stirpes & not in their own Right but that of their an=cestors & all the Children who thus take

take neither more nor less than their Ancestor would have don had he been living: 2 That the Claimants may take Jure Representationis it is necessary that the old Stock should be living

The Clause that Legal Representation shall extend no farther than Brothers & Sisters Children. has in its Construction been held to mean that Representation shall in no Case in the Collateral line extend beyond the third degree — {1 Atk 455 - 2 Vern 213 - Pin Ch 543

{2 Vern 49 - 50 - 1 do 598

Courts have conformed to the Stat in every instance except one that is that they have Preferred brothers & Sisters to grand Parents tho they both stand in the same degree

A Stat of Jac. 2 has also in one particular broke in upon the Symmetry of the Stat of Car. by declaring that neither when Brothers & Sisters come in

Competition with them Shall be deg=raded to a level with them - & take equ=al Shares with them And this idea has been Carried so far that when all the real Brothers and Sisters are dead the mother being on a level with them She was Considered as one of the Kin Stock & therefore the Children were allowed to take Jure representationis But in no Case except when the Brothers & Sisters Come in Competition with the Mother are they degraded from the first degree of Kindred {1 Salk. 38 P. in Ch. 527 {3 Atk. 762

Under this Stat the whole Blood are not in any degree preferred to the half it being the Propinquity & not the qu=antity of Blood which governs — P. Ch. 54 1 Atk. 454 - 1 Ves. 333 - 1 P. Wms. 41. 25. 594. 53 2. do. 355. 552. - 2 Atk. 115 - 18. 2 do. 762 - 11. 233 {2 Blac. 517

For the half Blood in the Stat. Car. 2 Stands

on an equal footing with the whole
yet formerly they were entitled to but
one half the quantity of personal pro
perty which the whole Blood were en
titled 2 Vent. 317. Cant. 57. 1 Ves. 124.

It is Settled after a great deal of met
aphysical disquisitions on the Subject
that posthumous Children may take
under the Stat of distributions it bei
ng now admitted that an unborn
Child is in esse
of Distribution under the Stat. of
Connecticut

We Conform exactly in the descending
line to that of Car 2nd But in the Collate
al & ascending line we differ & this
is the only variation from that Stat.
except that Kindred of the whole Blood
are preferred to Kindred of the half blood
in the same degree — But Brothers
and Sisters whether of the whole or ha
lf Blood are preferred to grand parents

The words of our Stat seem to be disara
=ged and are thus" on failure of lineal
descendants the Estate Shall go to the be
=thers & Sisters of the whole Blood & their
legal representatives, on failure of them
to the parents on failure of these to the
Brothers & Sisters of the half Blood, & in
default of all these to the next of Kin
& their Legal Representatives" — Legal
Representatives is indisputably mis
placed - it to have been placed immedi
ately after Brothers & Sisters of the half
Blood & then the sentence would have
stood thus." to the Brothers & Sisters of
the half Blood & their Legal Repren
tatives & in default of all these to the
next of Kin & the Construction is pu
=t beyond a doubt — by what follows
immediately after - which is that Re
=presentation Shall be allowed no
further among Collaterals than Brothers
& Sisters Children it has also been

warranted by a decision of the Supr^m Court of Errors. & Judge Reeve who dis=covered the defect has examined the original manuscript in the Lawyers hand who drawn the it from which it appears that the mistake must have been made in the transcription or that it is according to the construc=tion which the Supr^m Court of Er=ors have put upon it —

It is the duty of Adm^rs both in Eng & in Connt^e to make their distribu=tion at the end of one full Year from the death of the intestate. So that post=humous Children be let in tho if the adm^r neglects his duty and does not do it at the end of the Year he must afterwards make the distribution

of Advancements —

If Children have been advanced to their full Portion during the life of the int=estate - they shall not partake of the

distribution with the others- If he have
been advanced in part but not to their
full Portion it Shall be made up to
him by the distribution - but if they
have been advanced beyond their propo
tionate Share - they may Retain - be
Eng when a Child thinks that his advan
ncement does not amt to his distribu
tive Share & would have the deficiency
made up - he must throw it into Com
mon Stock - which is Called throwing it
into Hotchpot (an old term for Pudding)
& that with the rest of the Personal estate
must be distributed to him & the rest
of the Children in equal Parts
- But in Const he may Retain the advo
ancement in his hands & the deficiency
Shall be made up to him and this seems
to be the better way - for the advanc
ements may frequently be disposed
of to 3d Persons & then it cannot be
thrown into hotchpot

In Connt an advancement either in Personal or Real Estate is the same as to the Heirs of estate are distributed. But in Eng. the heir taking all the real estate of the ancestor an advancement during his life is no hindrance to his taking a Share of the distributive estate —

Any little present of Property that a Parent may give a Child is not to be Considered as an advancement — such as Spending money a watch a horse. but to be so Considered it must be given to advance & Settle him in life — In Con Property expended in the education of a Child is Considered as advancement. but not in Eng

Any thing which one has from an ancestor otherwise than by descent (except in Eng the heir in Case of real estate) if for his livelihood is Considered as an advancement {2 Ves 141 3 do 317 2 Vern 638.

There is a singular exception in the
Law of advancements in Eng. which is
that advancements by the Mother to
one of the Children shall not bar
him from taking an equal share wi
th the others under the distribution
of 2 P. Wms 356
The right of him who is entitled to
take under the Stat of distribution
Acts immediately on the testators death
or otherwise his heirs might be defeated
on his death before he is entitled to
payment. his Right immediately
on the intestates death is in re
but not ad. rem & a devise of such
estate will be valid tho the testator
die before the property is distributed
Of Distribution by the Executor
After Payment of debts & Legacies the
Executor having assets in his hands is
obliged to distribute them in the same
manner that the statute is after dow
=ment

of debts - however he is not entitled to the residuum which we have before remarked he is entitled to unless sufficient appear on the face of the will to manifest the intention of the testator to have been that he should not have it -

And that if there be no legacies given him or he be not otherwise noticed he shall have the Residuum - And also tho a legacy be given or he be otherwise noticed. Yet if it be in such a manner as not to Rebut the presumption that the testator intended he should have the Residuum. he shall be entitled to it - as a legacy for a particular purpose. for a suit for mourning Cloaths. for a mourning Ring & the like

And in addition to the foregoing it is remarked that tho the legacy be given him or he be otherwise noticed in such a manner that sufficient appears

upon the face of the will to Rebut the presumption that the testator intended he Should have the Residuum - yet he shall Still have it if he Can show by Parol proof that in fact Subserves the testators intention { 1 Vern 73 - 2 ca 674
{ 737 - 10 Wm 550 - 2 Ves 91 - 2 Atk 220

That parol proof is admissible to explain or Control a will Seems an excep=tion to the general rule "that Parol proof Cannot be admitted to explain or Control a writing - It is an exception & there is a Class of exceptions to that Rule in op=position or which authorises the except=ion & which is that parol Proof may be admit=ted to Rebut an equity or oust an imp=lication of Law - - Both branches of this Rule mean the same thing - which is that when Testam. has given a Construc=tion different from the legal one par=ol Proof may be introduced to explain away & Redeem the equitable to the legal

Construction we will see how far the admission of Parol proof in Case of wills agrees with the Rule —

The legal Construction of wills is that the Ex= Shall have the Residuum tho the Testator do give him a legacy — The equitable one is that he shall not have it, there being a sufficient legacy — Here parol proof is admit =ted to shew that the testators intention (notwithstanding the legacy) was that he should have it — Here it is written out to explain away & Reform the equ =itable to the legal Construction agree =able to the Rule — But it is to be rem =embered that Parol Proof is never ad =missible to explain away or Reform a legal to an Equitable Construction

{2 Atk 68 — 1 Wils 313 —

Of the Payment of Legacies —

a little more than a Century ago a Ru =le of this Kind was established in

Chan. That if a legacy was given to a Cr
=editor to the amount or greater than
the debt & was also applied by the Cred
=itor the debt was extinguished - this
Rule was founded upon the supposed
intention of the testator one however we
=uld not suppose that the testator in
tended to extinguish the Creditors debt
by giving him a legacy - & Chan J.
thinking the Rule ill founded have
whittled it away to nothing in the fo
=llowing manner
1 st legacy was given to a Creditor of
(Money) in Goods. Chan took it out
of the Rule because the Debt & Legacy
was not ejusdem generis
2 when the debt & Legacy are of the
same Kind - but Payable at different
times. Chan. denied the Case out of
the Rule for they said a debt must
not only be ejusdem generis as the
Legacy but also Payable at the same time

to be operated upon by the same Rule

3d a legacy was given of the same kind with the debt & Payable at the same time - But Chan. suffered the Rule not to operate because the testator declared that it should be Paid after all his Just debts —

4th But there came a Case not only ejusdem generis but Payable at the same time & without declaring that the legacy should be Paid after all his Just debts - Chan. would not suffer the Rule to act upon it because the legatee was a natural Child — 5thly. Chan seems now to have put the Rule for a Case came up with all the foregoing qualifications to bring it within the Rule - but nothing appearing on the face of the will to evince an intention of the testator that the legacy should Cancel the debt - Chan. would not suffer it

to be Cancelled and declared the Rule sh
=ould not operate unless sufficient
should appear from the face of the will
from which an inference might be
drawn that the testators intention w
=as such — 6th & lastly Chan. declar
=ed the debt should not be Cancelled
unless the Legacy was expressed to be for
the debt (this is what I call whittling)

& 2 P. Wms 116-551-3 do-227-1 Ves 531
2 do 409-636-1 Bun 125-P. in Ch. 236-240
2 Atk 300-3 do 96-1 P Wms 410 1. Bro Chan 229-295

It will be necessary not to confound
the foregoing Cases with a suit in wh
=ich a legacy does extinguish or Cance
=l a present duty. (but not a debt)
as when one has Covenanted to make
a Provision for a wife or Child &
fails to do it but makes a Legacy to
the amount of the Provision Contem
=plated - here an acceptance of the leg
acy Cancels the duty —

Sometimes we find a legacy repeated in the same will which if it be in the same instrument. the legatee will be entitled only to one of them for this supposed to be a mistake that a legacy is thus twice given but if the legacy is Repeated in a Separate instrument - (as a Codicil) they are Considered as cumulative & the legatee shall have both —

Of Lapsed & Vested Legacies

Legacies are divided into Lapsed & vested legacies - when legacies are Lapsed they sink into the Residuum of Lapsed legacies there are two kinds. 1st when the legatee dies before the testator. the legacy is always Lapsed, unless it be limited to a Second legatee as may be the Case - tho the Contrary has been Contended. 6 Vin. Ab. 470. 2 Vern 378

2nd when the Payment of a legacy depends on a Contingency - as if a

legacy

be left to A. when he attains 21. or if he attains 21. him if A dies before 21. the legacy is lapsed. but if a Legacy be to be lapsed when he is 21 it is a vested Legacy { 2 Vent. 342. 2 Salk. 415. 1 Vern 462 - 2 do { 679 - Or in Chan 21 - or 421 -

Tho Legacies may by a limitation be prevented from lapsing. yet the Rule that they may be limited must be taken with a qualification - for the Contingency on which the Surviving Legatee was to take must happen by the time the demand was 21 or married - as if A is Legatee But he dies the Legacy is to go to B. him on the marriage of or on A's attaining the age of 21 - B's Interest is totally defeated

Of the time of Payment

A Legacy not being lapsed it is the duty of the Exr to pay it when due - a Legacy given to one generally without a Specific time to pay it 'tis due at the

end of the Year from the testators death
But if the Legatee is an infant 'tis
the Exrs duty to keep the Legacy in his
own hands 'till the Legatee becomes ad
-ult. tho frequently they Pay it in
to the hands of the Guardian of Infa
-nt - but in such Case the Exr would
be liable ~~in Case~~ if any loss were
sustained thereby - ℄ 10. Vin 285 -

with respect to a Legacy to a feme Cov
-t it has been questiond ex di termini
whether it is not given to her Sole &
separate use - but 'tis now settled 'tis
not - unless so expressd or without
an equivalent to such expression
℄ 2 Vin 261. 659 -

A Specific time being appointed for the
Payment of a Legacy it must be then
Paid - A Legacy being given to an infa
-nt - to be Paid when 21 - must be then
Paid - tho if he die before that age; it
has been questiond whether it shall not

be immediately Paid to his Ex^r or Adm^r
But 'tis now Settled it Shall not till
the time he would have been 21 be Paid
to either his Ex^r or Adm^r

When Legacies draw interest

When a Legacy is given generally we have
before Remarked that 'tis Payable at the
end of the Year from the Testators death
& from this time it always draws int
-erest - from the time of being demand
-ed - But if the Legatee is not an adult
it draws interest from the end of the Ye
-ar. tho not demanded {1 Salk 115
1 Vern 251. 62

Whether a Legacy Payable at a day Certain
draws interest from that time tho not
demanded is not Settled the authori
-ties are divided upon the subject - tho
for the sake of uniformity in which the
Law delights - one would Suppose a
demand necessary to entitle the Legatee
to interest - as it is in the Case of a Leg
-acy

given generally {Pr. Ch 161. 2 Salk 415
if a father give a Legacy to a younger Child & make no other Provision for him
the Legacy draws interest from the end of the
end of the year - tho a Specific time of
Payment be Pointed out - & it is insert
ed whether (tho it seems Reasonable
that it should) it does not draw in
terest from the testators death - as it
is the Fathers duty to provide for his
Child {C. Ch. 11

A Legacy given to any one Charged on
any Funds or Lands which yield an
immediate profit draws interest
from the testators death {P.W. 26-7
because 'tis supposed to be the testators
intention that the Legatee should have
the interest he having not otherwise
disposed of it — If Legacies depended on
the gen: Rules of Law - there would be
no difficulty with Regard to their
drawing interest - for 'tis a Gen: Rule

of Comm^t Law that a debt as soon as due
draws interest til Paid which if no in
terest be expressed is given the Creditor
in the name of damages - But a Legacy
given generally does not draw interest tile
demanded. the reason of which is that
the Ex^r being a trustee Shall not be oblig
ed to go about like a Common debtor &
hunt up the Legatees - But the Legatee
himself shall Call for the Legacy - so that
if a Legacy be given to be Paid on a day Cer
tain (tho 'tis not Settled it is presumed
on the same principles, the Legatee will
not be entitled to interest until demand
ed. The legal title of the Legacy ~~never~~ vests
in the Legatee untile the assent of the Ex^r
till then the Ex^r has the legal title & the
Legatees equitable right is defeasible on
a deficiency of Assets to pay the debts
without the Legacy. & tho the debts are
Paid yet a Sale by the Ex^r to a bona fide
Purchaser for a valuable Consideration

vests the Property in the purchaser to all intents & Purposes - And the Legatee remedy then is against the Exr out of whom he may Recover the worth of the Legacy in damages but not the Legacy itself — But an Exr having assented to the Legatee having taken the Legacy - he is from that moment divested of the tittle of it. from which time a Sale of it by him would not vest the Property - & any words from which an assent may be implied is sufficient

{ Plow. 35 - 5 Co. 29 -

Of Restraining Legacies

Legacies are sometimes given to Restrain improvident Marriages - with a Condition that they Shall be void or that the Legatee shall not take the Legacy provided (for 'tis generally females to whom such Legacy is given) She marries without the Consent of some Certain Person point'd out - in the will Such Restraints are void & the Legatee takes the Legacy in despite of the Restraint

thereof notwithstanding the intention of the testator for it is considered that allowing such Conditions to be valid would be discouraging wedlock which is contrary and impolitic - Yet in one case from its Particular Circumstances such Legacies are suffered to be governed by such Restraints - when a Husband bequeaths his wife a Legacy - She having Children by him to be his Provided She does not marry again - him on account of the Children 'tis allowed - Neither when a Legacy is given Restraining the Legatee's marrying any of a Particular Profession is the Restraint valid - but the Legatee takes it independantly of the Condition - And here again the intention of the testator is disregarded on the ground of Policy - But so far as this is settled. the testator has Power to restrain marriages with Regard to the time provided that Restraint of time is reasonable

as a Legacy to one to be taken Provided she does not marry before she is 21. It seems also that a reasonable restraint with regard to the Place of marriage is allowed as when a Legacy is given to be taken Provided the Legatee did not marry within the City of York — Restraints have also been held valid when the Legatee was to take Provided he or She did not marry Persons of Certain Religious Creed as a Papist - tho Probably at this day in Eng.d they would not be suffered as they doubtless would not in Connt. Though a Legacy given to be taken provided the Legatee marry with the Consent of a Certain Person is taken in such exactly of the Restraint yet if the Legacy be limited over to another Person A second Legatee on the marriage of the first without Consent of the Person whom the Testator appointed out to give it. Such Restraint is suffered & the Legacy goes over to the second Legatee & 1 Vent 199 - 2 Vern 290 - 1 Atk. 502. P. Ch. 565

Of The Ademption of Legacies

There is such a thing as a legacy's being adem=ed or Revoked without a revocat=ion of the other Part of the will - for there may be Cases when the testators inten=tion which was to give one a Legacy, is al=tered & in such Cases the legatee is not entitled to the Legacy -

That a Legacy be ~~adeemed~~ ademed it is necessary that Part be Shewn from wh=ich a clear & fair inference may be drawn that the testator intended to adeem it - for the intention is how the gov=erning Principle & Hoo Rep. 335. 2 Ves 681 115 - Ideo 95 - P. in Ch. 263 - Eq. Cas. ab. 302

Technical words are not necessary to create a Legacy - any words however absurd if they shew the intention of the testator are suf=ficient to create a Legacy - Legacies are div=ided into Gen.l or Pecuniary & Specific Pecuniary Legacies are money given in Pounds Shillings & Pence or dollars & Cents

Specific are a gift of any goods or Chatt
=els which may be identified & sum mo
=ney when given in such a manner as
to be identified as a Certain Bag of Money
sufficiently described is a Specific Leg
=acy. — But 'tis not uncommon when
a Legacy is given to a number to give the
Exrs Power to distribute it among the Lega
tees - this however Chan. will Control
& see that 'tis exercised in a Reasonable
manner - or otherwise such Power m
=ight have the same bad effect as Legacies
Restraining marriages. the Exrs might
thwart the testators intention. as when
the Mother in law who has had the
Power of distribution gave her own da
=ughter £900 & her daughter in law £100. of
the Legacy. Chan. interfered & caused a
more equal distribution on the ground
of following the testators intention
1 Vern 355 or 25. 2 Ca - 513. 421 -
"With regard to the Construction of ~~wills~~ Lega
=cies

the intention (as in wills) is the Pole-
star - as if one give a Legacy to the Chil
-dren of A. he then having Children
those only take under that Legacy
which were then in esse tho' more be
afterwards born. for such is supposed to
be the testators intention.

{ Pr. in Ch 470 - Co Lit 112 -

So if A gives a Legacy to the Children
of B & C. they muthe of them at that time
having Children - all the Children they
shall have tho' in unequal numbers
shall take Per Capita { 2 Vern 450 - 760 -

It seems there is a Contradiction of auth
orities with Regard to the Children who
are born between the testators making
the will & the testators death - whether
they shall take with those who were
in esse at the time of making the
will — Some authorities are in the affir
-mative & some in the negative. But there
seems to be this difference - where they

an Infant to take - the will says all the Children - when there is no Children there being no Children at the death of the Testator / the Grand Children are then allowed to take as Children -

There are frequently Devises like this. "I give & devise my Relations" to all my Re=lations / to my Poor Relations &c. Such wills notwithstanding the testators intention have on the ground of Convenien=ce been held & still are to include those Relations which would take under the Stat. of distributions / Salk 251. 2 Ves. 557

Whether if a man devises "all his Personal Estate" it Carries what he dies Possessed of, or what he had at the time of making the will has been a quest=ion. but now 'tis Settled on the grou=nd of Convenience - Property in things Personal being so fluctuating & transit=ory, & therefore a will of Personal Prop=erty is Considered in the nature of a Conv=eyance

like a Devise of Real Estate which Carri
-es only what the testator had in his Possess
-ion at the time of making the devise
But Such will Carries all the Personal
Property that the testator could Possessed
of - On the same ground if a man ma
-ke his will & give all his Personal
Property which he has in a Certain pl
-ace it Carries all that he had at th
at Place at the time of his death

& 2 Vern 688. Salk. 237.

On a deficiency of assets to Pay the lega
-cies. the Specific Legacies must first be
paid - & the Residue if there is any mu
-st be averaged among the Pecuniary
Legatees. in proportion to their Legacies
on whom a loss must always fall
in preference to Specific Legatees —

& 1 Vern 312. Salk 416 —

Here the Specific Legatee has the advanta
-ge over the Pecuniary. but when the Spe
-cific Legacy is lost by the act of God or

invitable accident. The Specific Legatee has totally lost his Legacy. tho there be assets left sufficient to Pay it —

The Rule that Specific Legacies must be Paid first. before Pecuniary is universal. there seems one exception. where a man gives all his Estate in Specific Legacies & gives a Pecuniary Legacy. the Pecuniary Legacy must be Paid first. but this is fact no exception to the Rule the Pecuniary being merely a Charge upon the Specific. a Condition Dependent on the Performance of which they are to be Legacies — & Precedent in Ch. 393

And the Prohibition of average in the Payment of Pecuniary Legacies is never to be carried from. even the testators intention is made to give way to it. (this is wholly for the intention of the testator is the Pole Star) 1 Vern 86. 2 Vern 434 —

There being a deficiency of assets to Pay all the debts — it is as generally

Reasond opinion that they are not proportionably to abate. but that the Exr may dispose of so many of the Specifick Legacies as are sufficient to Pay the debts & dispose of the others to their Respective Legacies - Tho this to be giving the Exr a reasonable Power of being Partial & is yet a question there being different Authorities upon the point - Ca Affirm. 1 P Wms 422

Ca Negatur 2 Ch Cas. 179 -

Of Refunding Legacies -

When an Exr is about to pay a Legacy he is entitled to Security from the Legatee that he will refund on debts Coming in which Require that Legacy. —

Yet Tho the Legatee can get no Security than will (there being no Probability of debts Coming in which will require that Legacy) oblige the Exr to Pay it -

And Tho the Legatee give no Security to Refund he must Provided after debts Come in which Require that Legacy, or make it appear -

If the Exr did not at the time he Paid the Legacy know the debts to exist. But if he did this Rule is established (tho illiberally) that the Exr cannot oblige the =m to Refund

Creditors standing in this situation the Exr having paid the appellee in legacies may come upon the Exr & then (the Exr being a Bankrupt -) upon the Legatees so Probably the Creditors might quit the Exr & first Come upon the Legatees tho the Exr was not a bankrupt - in the Case when they had given no security to refund & the Exr ignorant of the exist ence of the debt - So the Law is the same respecting Specific Legacies - when the Pecuniary have been first paid -

2 Vent. 358. 1 Vern 90. 2 do - 205 - 2 Ves 193.

& 1 Vent. 360 -

In Consequence to prevent trouble to the Exrs this in the Power of the Court of Probate & 'tis their duty to set at time within

which all Creditors within this State must
must present their Claims or be Barred
after which time the Exr is discharged
from all demands upon him - tho he
has assets out of which he pays Legacies
tho whether the Creditor might not
come upon the Legatee as in the Case
case Creditors may ~~Come upon~~ be let
in upon the heir so far as Specialty
Creditors might have gone - so also may
Legatees - But Legatees may not be let in
upon the devisee
In Eng. to Recover a Legacy an application
is generally made to Chan - In Connt
an action of Assumpsit may be Brought
at Com. Law - — An Exr having
Promised to pay a Legacy may be sued in
Account of Common Law in Eng. but
by a Stat. there - & in Connt the prom
ise must be in writing to enable the
Legatee to maintain the Suit - or the
Legacy must be in the hands of the Exr

A Legacy Charged upon Lands was alw=ays Suable in a Spiritual Court. but this Regarded not the Ex=r but the heir or Person to whom the Lands were given who takes the Lands with all the Ch=arges upon it & which he is always liable & 6 Mod. 26. 1st Ray 937-

Of the Defence of an Executor

An Ex=r having assetts can make no defence - if he has not assetts to Pay the Pecuniary Legacies he Pleads on a Su=it for them Plene Administravit So if he has no assetts after Payment of debts either to Pay Specifick or Pecun=iary Legacies he Pleads Plene Administ=ravit - but if having assetts which the Specifick Legacies will exhaust he must to a Suit by a Pecuniary Legatee Plead that there are Certain out Standing Sp=ecifick Legacies or debts & that he has not assetts ultra

Of the Exr duty to Pay the testators debts

It is the same as the admr & on this sub
=ject our law is entirely different from
the Engl & first of the English mode
of Payment & according to this mode
Certain debts have a priority over oth
=ers & those of the first degree are 1st to be
Paid &c - The Exr or Admr having assets
(for this duty is only to pay the amt
of assets) is first to pay the funeral ch
=arges & Charges for taking out administ
=ration - The funeral expences however
must be Proportionate with the circum
=stances Situation & State in life or else
the Exr must pay the excess of them himself
& assets still remaining. the debts of Re
cord & Speciality due to the Crown
must be paid {2 Blac C. 511. 3 -
3 Certain debts that are by Statute ord
=ered to be paid. first are last Sickness debts
4 - Debts of Record - 5 Speciality & 6th Duty
Simple contract debts - & 'tis no duty
=ence

either to the Exr or admr when called
upon by a Creditor of higher degree
to plead that he has exhausted the
assetts in paying Creditors of a low
er Rank. he having so done he must
pay the Creditor out of his own Pocket
But of an equal Rank the Exr or ad
=ministrator may take his Choice.
unless one has Commenced a Suit
& for it Recovers Judgt who is then
entitled to his whole debt tho to the
exclusion of all others — If an Exr
Pay a Spriality Creditor not know
=ing of a Record Creditor & thereby ex
=hausts the assetts. he is liable for
the Record debt out of his own pro
=per for by applying himself to the
Record of the State he might have
known the debt to have existed
Not so if he pay a Simple Contract
debt before a Spriality of which he
was ignorant. for he Cannot know

of Spiritualty debts just as this — Voluntary Spiritualty Creditors are postponed to simple Contract Creditors agreeable to the Rule that Volunteers must be postponed. for a voluntary Bond Creditor is Considered in the light of a volunteer, but he is Considered as standing upon all other volunteers as Legatees &c — 3 Ch. Rep. 222. Com. Rep. 255 —

Equitable Assets are such as ought in Justice to be in the Exrs hands for the Payment of debts — but which he has no Legal method of obtaining & which he can come at no other way than by the interposition of a Court of Chan. as a devise of Lands in trust to be Sold for the Payment of debts here the Exr has no way of coming at the Lands & if the Trustee do not Sell the Lands. they are not Legal Assets here Chan. will interpose and Compel a Sale of it & then the money will be

equitable assets which like all other Equitable assets are Paid out pari passu ℔ 30. 1 Vern 340—

A Creditor coming upon the Exr he having Paid all the assets to higher or equal Creditors who have before appeared — he may Plead Plene administravit but if he still has assets but not more than enough to pay debts of a higher degree: he must Plead that there are out Standing debts of a higher degree & that he has not assets. when there is a question concerning a bond - whether voluntary or not between a Specialty & Simple Contract Creditor the Exr for his own safety may file a Bill in Chan. which will order the Parties before the Ct & determine the affair.

Commutual mode of Payment In Comn - not only the personal but the Real property of the deceased is pro rata

in the hanas of the Exr for the payment
of debts - But the Personal is first sub
ject & then the Real by an order of
the Court of Probate - Debts in Contr
have no priority except Funeral Char
ges debts due to the Treasury & Last Sic
knys debts - all other debts are Paid
Pari Passu - on a deficiency all the ass
ets being arranged proportionably am
ong the Creaitors of all Ranks
When the Exr is apprehensive the
Estate is insolvent he must apply
to a Court of probate - who will au
thorize 3 Judicious Persons to appra
ise all the deceased's Property - of which
'tis the Exrs duty to make an inventory
& also to adjust all his accounts - allow
ing such debts as are Just & Reasonable
& Rejecting all others which they have
full authority to do - & if on the appr
aisal of the Property & adjudicating the
amounts the Estate proves insolvent, the

Exr may take the Property at the appraisal
of the Court of Probate having struck
the average / Pay it out of his own pro
per - or he may Sell the property and
the avails thereof. No more than the ap
=praisal shall be appropriated to the
payment of the debts - & if there be
a Residuum it shall be exhausted
in the Payment of Legacies - or distri
=buted according to Stat - If the Sa
=le of the property does not amt to
the appraisal. the average must be
proportionably Returned — More
Estate being discovered after is struck
the Exr must go forward to the Court
of Probate & get an order for a new
appraisal of this estate which he re
=turn inventory - and the proceedings
are as before the estate discovered
must be averaged if it proves insol
vent - If not the debts must all
be Paid & the residue disposed of accord
=ing

to the will of the deceased or as the law directs —

The allowance of the Commission-ers is not final as it Rebuts the Exr or Admr for he to a Suit for a debt so allowed may make any defence that might have been made by the testator or intestate but their disallowance is final as to the Creditors Claim

It is a principle of law that when one has gained to himself by legal diligence a lien upon property as a Security for debt. that lien shall not be taken from him in favor of any other Creditor. & therefore when one has secured his debt by Mortgage - it shall not be subject to the average law & on the same ground it would seem that when a Creditor has gained a lien upon property by levy of an Exn his debt shall not

be Subject to the average Law tho the
gent opinion is Contrary to this.
Quare would not the Case be the
Same when probate had been Levied
upon to Reckoned a Judgt?—
An Extr in Comm. Can never Plead
Plene Administravit but to a Cred
=itor but he must Pleade Spicial
=ly that according to the average he
was to Pay 5 Shillings on a pound or
what ever the average may be Excep
=pt when the Payment of funeral
Charges or Public or Sickness debts
On new Estates being discovered after
the time Set by the Court of Probate
for all Creditors to bring in their ac
=counts or else be Barred of their debts
those Creditors who did not Come in
before - now may & have their paid up
to the average which had been paid to
the Creditors who Come in for the for
=mer average if there be suffecient

Estate discovered & the Remainder Shall
be arranged among them & the former
Creditors & if there prove a Residuum
it Shall be distributed or disposed
of in Legacies. but if one of those
of the Creditors or any other Creditors
as have been to any expence in di
scovering this Estate their expence
es Shall first be Paid them from
So if an Exr Refuse to Pay an admi
nistrator to this now discovered estate
a Suit must be brot on his bond
for the faithful discharge of his trust
& in the name of the Judge of
Probate — all this now discover
ed Property out of the Exr or admr
& the Judge of Probate will hold
is as trustee for the Creditors &c —

So if an Exr will not Execute upon
this now discovered Estate — or the Adm
r will not administer. he may be
displaced. & an administrator de bonis
= non

appointed to administer upon it

Bills

The our Stat Says that Sickness or debts shall be allowed first - yet our Courts have allowed only last Sickness debts. thereby inducing the Physician the nurse & the apothecary to kill the Patient - Probably from the English Practice / which the Stat wants / but 'tis very doubtful whether if the question Should be agitated before the Supreion Court. they would not agreeably to the Stat determine that all Sickness debts Should be first Paid

If a man Convey an Estate fraudulently for the Purpose of defeating his Creditors. such an Estate during his life affects them not but they may Commence a Suit against him or attach the Estate as if no Conveyance had been made - but on his death the only way to get at it is by suing the grantee as Ex^r on son tort -

Assetts

All property which Comes to the Exrs hands is Assetts. in England the Personal property only is legal Assetts tho by will Real Estate may be made Equitable assetts. In Connt both Personal & Real Estate is assetts in the hands of the Extr to Pay debts —

Indivisible Property as Bonds. Notes & all Personal Chose in action. but for Chose in action the Extr is not (liable) answerable until Recovered But for Chose in Possession an Extion may be issued on a Judgt obtained at the end of the year —

Chatels Real are both in Engd & in Connt assetts tho they nominally descend to the Heir but by the Com. law animals ferae naturae confined in a Park are not assetts If a man Rent his farm for a term of years Reserving an

annual or Perquisite Rent. That is not Assets. but goes where the Estate would have gone had it not been Leased — But if the Estate had been Leased for a Sum in gross 'tis Assets. So also is Rent in arrear — when a tenant Pur autre vie dies before the Cestuy que vie. the Estate till the death of cestuy que vie (the Estate) was Sworn to the first occupant. But now by a Statute Eng. it Shall be Considered as Assets in the hands of the Exr Emblements are Assets in the hands of Exr. to on the death of the owner of the Land — All Such movable Estate as is annexed to the freehold & was formerly Considered to go with to go with it. is no Considered as Assets Provided it Can be Sev and without injury. Such as Glass & the like — 3 Atk 73 —

Extraordinary Paraphernalia of the wife are Assets for the Payment of debts - In Eng after all the Personal fund is Exhausted - But if Specialty Creditors have exhausted the Personal - & thereby made her Paraphernalia liable She may come in ch on the Lands of the heir or devisee so far as the Specialty Creditor might have gone - for She is Considered as a Creditor for her Paraphernalia tho the Lowest of all the Creditors - yet higher than any volunteers to which she is preferred - The ordinary Paraphernalia - Can neither be Sold by the husband nor is it Assets in the hands of the Exr - neither Can her Extra Paraphernalia be claimed tho it may be by the Husband & duly disposed of - And as all that Estate which is Assets must be disposed of before the wifes Paraphern

alia

Can be taken in Eng./ which is only the Personal/ we must from a Parity of reasoning Conclude. that in Contr. the Real must first also be exhaus Ted as that is a petts as well as the Personal —

When the husband has Pledged the wifes Paraphernalia she may after Payment of debts take the person al if there be any left. to Redeem it — 3 Atk 396 369 — 94 —

Devastavit

An Exr is not liable for any loss that may Come to the a petts. Provid ed he use ordinary Care in the Pre servation & Keeping. if he has not used this degree of Care he is liable & is Considered as having Comitted devastavit. when Goods are lost not by the Exrs fault he may to a suit by a Creditr Please Plene administ trait & give the loss in evidence

If the Exr as he may in Consciense take the Assetts to himself he must Pay the debts so far as the Assetts would have gone out of his own Pocket — So also when a debt is Paid out of its Rank So when an unjust Claim is allowed — the Exr in Eng. finally is in a dilimma — But to Shield him from danger he may in Court get the advice of a Court of Probate which is Suffitient — If he Pay a debt Barred by the Stat. of Limi. 'tis a question it is a devastavit or not — if it was a Just Claim I presume our Courts would not Consider it So — The payment of an usurious Note has been Considered a devastavit — Tho it would not be So Considered when the principal & legal interest only was owed —

E. Noyes Pub.

If an Exr Pays a debt thro Carelessness

which has already been Paid it is a Devastavit — If an Exr in Selling the goods of the testator Suffer a loss than that want of Care & diligence which an ordinary Careful man would use he is liable for a devastavit

An infant Exrs Contracts do not bind him exactly as do those of an adult — Exr for he is not bound by any Contracts which would make him Guilty of a devastavit — Thus for if an infant Releases a Bond without Payment he may plead infancy & avoid his Release but if he is bound by any Contract which would not Cause a devastavit as is an adult Exr & tho he is not bound to the Person with whom he made the Contract amounting to a Devastavit. Yet to the Creditor or the Voluntier he is bound to the amount of the devastavit & 5. Co. 27. 1 Bulst 130. Cro Eliz. 671. Cro. Car 420.

Evidence of an Exr having discharged a
debt due his testator is sufficient wi
=th that Sum as having Rect of
the debtor - So an Exr in Eng. is man
safe in discounting a debt tho wh
olly bare - but in Comm.t by the
advice of a Court of Probate he m
=ay Still himself & I. Rep. 307
& Cro E. 43 -

While penalties were Recovrable
at Law in Eng. / the Chan always
relieved against them / If the Exr Re
leased the obligor on Receiving the
Principal of a forfeited bond he was
in technical terms maide accom
=d Guilty of a Devastavit { Cro. Car. 491
when there are Several Exrs the
act of one negligently regularly bi
=nds the whole - So assets in the he
=nds of one is assets in the hands
of all. but if one of them Commits

a devastavit he only is liable -

Of Suits By & against Exrs & Admrs

Some actions cannot be maintained by or against Exrs or Admrs - which might have been maintained by or agst the testator or intestate -

Action arising ex Contractu may always be maintained by an Exr but for Personal injuries done to the Testator the Exr can have or maintain no action for such Causes of Personal actions done to the Person of the intestate - So at Com. law the Exr could maintain no action for injuries done to his testators property. but he now may by Stat. de bonis aspo=rtatis the Equity of which has been ex=tended to all injuries done to the pers=onality of the testator or intestate

& Latch 168. Cro Eliz. 377. 1 Vent 187.

For injuries done to the Real property of the deceased. the Exr or admr

can maintain no action in Eng. tho they can in Connt - when the Right of action is grounded on a real Contract the Exr or Admr cannot bring it, unless the Right of action accrued in the life time of the Testator or Intestate - No action can be Brought agst an Exr or Admr for personal wrongs Committed by the Testator or Intestate - but for all breaks of Contract an action may be brot; the maxim that actio Personalis moritur cum Persona applies in some Cases to injuries of the deceased to another Personality & some Cases not - If the injury terminates in injury without any benefit to his estate, no action lies agst the Exr or Admr - But Contra if his Estate is benefited - Such action however must not sound in tort - but it being founded in property the Plff must bring an action of Debt

Italics assumpsit

on the grounds of the implied promise of the deceased his property by the injury being benefited 8 Comp. 371 —

But to support indebitatus assumpsit the property must have been sold or not to be found. so that a sale will be presumed. for if it Remain in the Exr or Admr hands. the owner will sue again either — not as Ex. or Admr but as J. S. or Tom Nokes

Of the Bonds of Exr & Admrs

An Admr is at Com. Law obliged to give Bonds that he will duly perform his trust 1. that he will make a true inventory of the Estate 2. that he will not embezzle any of the Estate but Render a just account of the same to the Court 3. that he will distribute of the Estate as the law directs — In Connt an Ex. as well as an Admr is obliged to give a similar bond —

only that the Exr binds himself to pay Legacies - In the Construction of this Bond Non Payment of debts has been held Considered a violation But the Court must sue the Exr before he can come upon the Bondsmen

At Com. Law if a Party died during the pendency of a Suit it could not be prosecuted by or agt the Exr or Admr - And so Continued until a Stat. Provided that in Case a Plff die his Exr or Admr by entering his name on the docket of the action & Continue the Suit - if it be of such a nature that he might originally have Commenced it - that in Case the Deft. dies the Plff may by a Scire facias Signed by the Clerk of the Court - Call in the Defts Exr or Admr to defend the Suit - But no provision is made to Compel the Plffs Exr or Admr to Continue the Suit Commenced by the testator or intestate

which Seems to be a Casus omissus

In Eng. when an Exr Circumstances are doubtful - as when he has given some evidence of a disposition to dissipate his Asst - Chan. will oblige him to give Security - on failure of which they will disallow him. but Poverty is not a Sufficient ground to make an Exr give Security —

Of An Exr de son Tort —

An Exr de son tort is one who assumes any act of ownership over the property of a deceased Person by which it would naturally be supposed he were in fact an Exr or administrator —

Acts however that are —— or any other hypothesis than ownership of the Subject matter will not make an Exr de son tort 2 Co Eliz. 630

2 Roll. 91. 8 Salk 313 - 2 Mod 174. Carth. 104

~~It seems that when there is an Exr de son tort~~ when ~~an Exr de son~~

It seem that when there is an Exr or Ad=
=ministrator acting upon the Estate
there can be no such Person as Exr
de son tort — for Persons assuming
acts of ownership are trespassers and
may be treated as such by the Exr or
Admr — An Exr de son tort can sue
no one — tho he is liable to all the ac
=tions a Rightful Exr would be pro
=vided all the assetts have come to
his hanas. for he is liable only so
far as he has actually Recd assetts

An Exr de son tort having falsly
Pleaded that he had not intermedled
with the Estate was made liable to
the Amount of the debt. tho assetts to
that amount had not come into his
hanas. & this as a punishment for
his false Plea 5 Rob. 49 1 Roll 914 —
And after they have disposed of all
the assetts that have come to their
hand they may Plead Plene administra
=vit

{5 Co. 33. Cro Eliz. 472 —}

Mr Gould Supposes that wherever there is an average Law there can be no Ex: de son tort for he is not under the donation of of a Court of Probate Jurisdiction the Creditor who sues will Recover his whole debt. the Estate be insolvent — A Person who sues Law-Exists ought to be sued by the Rightful Ex: or Adm: as a trespass for assuming acts of ownership & the damage he thus Recovers ought to be inventoried with the other assets

A fraudulent grantee however must be Considered as an Ex: de son tort and as such the property so fraudulently Conveyed must be Recovered out of him. for the grant is good against the Ex: of the fraudulent grantor 6 Dum 587 —

An Ex: de son tort will be liable to the Rightful Ex: or Adm: tho he have Paid all the debts but that

payment will go in mitigation of da
mages but when by Payment of the
wrongful Ex^r the Rightful one is
prevented from Retaining his debt
it would seem liable he ought to
be liable to the full amount of that
debt –

Testaments

The Policy of the Law has enabled a
Person to Control his Property of some
kinds to a Certain extent after his
death – This Power does not extend
to all kinds of Property. for a man
Can never devise his Real estate so
as to deprive his widow of dower
Neither Can a Joint tenant where
the Jus accrescendi prevails. dispose
of his Joint Estate neither Real nor
Personal. by will – Certain Property
it a man gets with his wife. as Choses
in action not Reduced to Possessi
on – his Chattels Real & Personal

tho he has the absolute Control of them
in his life time yet he cannot alien
one of them by will. 6 4 Co. 67. Co Litt. 182 a 185

And property which can be alienid
cannot be Perpetuated. Personal pro
perty viz Chattels Real may by way
of Executory Devise be limited to one
Person for a term for life. Remain
der to another. But such Estate can
be limited to take effect only upon
an event which must happen during
a life or lives in esse

Personal Chattels may be given by will
to one for life & Remainder to another
& this was Suffered in Connt till of
late. But is now exploded. 2 Blau. 338

Real Estate by the Statute of Uses
may be limited to Contain him for
ever. but Courts by their Construing
Devises have favored means by which
such estates may with ease be barred
& Real Estate may by way of Executory
devise

devise be limited over but the contingency on which the last Remainder is to take effect must happen within the life or lives in being & 21 years & 9 months from the death of the devisor — An Idea has been holden that the Remainder man might Combell the life man when an Estate in Personal Chattels is limited to one for life Remainder over to give Security safely to keep the Chattels 1 Bro Ch. 279 — & that may now perhaps be Considered as Contradicted — yet he may now it seems demand an inventory of the Estate —

Persons incapable to make a will

All persons generally Speaking in the Eng^d^ law may make a will of personal Property except those whose deficient in understanding: 2. In Liberty & freedom of will & 3. on account of their Criminal Conduct

First. Persons wanting discretion Compet
ent to the making a will are Idiots
insane Persons. Persons of non sane
memory. Lunatics (except in Lucid in
tervals) & drunkards while in a
state of intoxication - all Persons
whose minds have become so debil
itated that they are not of sufficient
discretion & do not understand the nature
of a testament. - An illiterate or bli
nd may make a will but it must be
Rightly Read to him on his Request
Infants in Engd - if males under the
age of fourteen if females under the
age of 12 are incapable of making
a will. & in Connt. either if under the
age of Seventeen 6 Co 23. 39. Moor 760
6 2 Ca 469. 2 Mod. 315

2. Persons intestable for want of a free
will are Persons under duress. for the
Instrument of a Person which he was
actually obliged to make is no will

But that a feme is intestable is ab-
-surd that She has no will. that She
and her Husband are one are light ma-
-xims which are hardly worth men-
tioning - If She has no will how is
She Punishable for any acts? if She
& her Husband are one in law. how
can She take Property to her Separate
use? - A feme Covert like other wo-
-men may make a testamentary
disposition of her Estate which affects
no marital Rights of her Husband
When it was the practice to endow
wives ad ostium ecclesiae such dow-
-er being the Sole ~~use~~ Property of the
wife She was ever suffered to dispose
of it by will - And in modern ti-
-mes Property given to the sole & sepa-
rate use of the wife may be devised
But in Eng She is expert by Hen 8th
incapable of making a devise of her
Real Estate. whether such devise

would or would not affect the ma
rital Rights of the Husband. But in
Comm^t. it is enacted by a Particular
Stat. that She may devise her Rea
l Estate 6 l Salk. 213. 2 Mod 219.

A Person making a will thro excep
of importunity or agreably to the ~~ci~~
~~vil~~ ditto of some other Person is Justly
Considered as not the act of the testa
tor. Such will is void.

3^d Class of Persons incapable of making
a will on account of their Criminal
Conduct. are all traitors & felons from the
time of their Conviction for from that time
their goods & Chattels are forfeit. neither Can a felo de
se dispose of his Chattels by will for they
are forfeited by the manner of his death neither
can outlaws for the same Reason. 2 Blac. 499.
In Comm^t. two Crimes work a forfeiture of
the goods & Chattels of the Criminal but
Manslaughter & grand Arson ~~Suicide~~
Such Persons being intestable as to their
Estate

Requisites to a Personal Will

Instruments of Personal Estate are of two kinds written or verbal or Nuncupative — Firstly written wills need no witnesses of their Publication if written with the testators own hand it is not necessary that his name Should appear on the face of the will much less at the bottom according to the usual mode of signing on the ground that the intention of the testator is to govern let it appear in what form it may. but this loose admission of wills Judge Reeve thinks more frequently Contradicts than Performs the testators intention. for a Person might (as he thought) Partly Compleate a will. his intention altered he throw it by. thinking it of no force. yet that if discovered might be Construed valid — a Seal is not necessary — If the instrument is written

by mouth it is sufficient without the testators Signing if proved to have been done by his direction

It is a Received opinion that a testament may dispose as to the Real & goods as to the Personal estate Thus in mention'd & this to Reason from the instrument only appears sufficiently probable But we shall find that in many Commendable Cases Law varies from Justice & from the testators intention - Suppose a man in Eng. has two Sons & has a property £1000 - in lands & has an equal property in Personal estate - his youngest Son being a farmer he wishes to give him his Real Estate & his eldest Son his Personal Thus one makes a testament accordingly which has all the Requisites of a Personal will - Therefore the eldest son according to the Rule will take the Personal Estate & the testament

being bare as to the Real Estate by not having the nuncupative Requisites. the Eldest son will also take this & the youngest entirely disinherited of his Patrimony —

2dly Nuncupative wills at Com. Law were suffered of all the testators Personal Estate — But now by the Stat. 29 Charles 2 c 4 & 5 tem. so many Restrictions are laid upon them that they have almost totally fallen in: to disuse — Those Stat. Restrictions are 1st that no written will shall be altered by a subsequent nuncupative one — unless the same be in the life time of the testator red. unto writing by him approved on a Reading & unless the same be proved by three witnesses on oath

2ndly that no nuncupative will shall in any Case be good if the estate bequeathed exceed £30 value — unless

thru be thir witnesses present at the time of making & unless they or some one of them were by the testato ~~as at the~~ specially Required to be witness thereto & unless it were made in his dwelling house - the witnesses in the foregoing Case must be such as are admissible in a Court of Com. Law - 3. That no nuncupative will shall be proved within fourteen days after the death of the testator - nor 'till notice hath been given to Call in the widow & the next of kin to Contest if they think proper - nor shall it be proved by the witnesses after Six months - unless put in writing within Six days after making

In Connt a Nuncupative will to be valid must (it has been & is so Considered) be made in extremis —

The words which Constitute a Nun

=Cupative will

must be such that it is Clear that the intention was to bequeath / middle lose or doubtful discourse is Suffi=cient / & he must Regard the Lyst=anders to bear witness to his bequest

{2 Blac-500-1

Donatio Causa Mortis

Is a Conditional gift given in Contemplation of death - & the gift to be good must be given in the donors last sickness for the Condition on which it is given is that it Shall be Returned on Condition that the donor Recover - & this Condition is all in which it differs from any other gift - this property so given goes like ~~any~~ other Personal estate of the testator but ~~not~~ never his agent to vest in the ~~testator~~ donee

This gift is as all other dependent on a deficiency to Pay the deceased debts & the Creditor must come upon the donee as an Ex^r de son tort as in the

Case of fraudulent grants — There m
-ust be an actual delivery, or som th
-ing equivalent thereto of the gift to
make it valid — It has been qu
-stioned whether a bond or the like can
be the subject of a gift - Causa motis
because the donee cannot sue such
Bond - in his own or in his testators na
-me it can be said only the Exrs name
& he 'tis said is not obliged to suffer the
donee to use his name — But it seems
Reasonable to suppose that Chancy
will Compell the Exrs to allow his na
-me to be used - on sufficient security
being given to indemnify him from
any Costs — 2 Bun. 514 - 10 Vr. 406. 3 Ves. 356
2 Ves. 531 —

Who may be Legatees —

All persons may be legatees. — Tho a feme
Covert cannot unless the legacy is given
to her separate use for otherwise a legacy
to her is a legacy to her Husband provided

it be of Personal Estate — if the vesting of a Legacy depended as is said on the assent of a Legatee — many who may be Legatees could not be such, as Idiots insane Persons Infants &c — The fact is the Legacy vests without the assent of the Legatee — but ~~the~~ is liable to be divested on the Legatees dissent — 2 Vern 261

Note. The Subject of Revocation & Republication will be treated of under Devises —

Of the Exrs liability for Costs

An Exr is not liable for Costs in any suit brought by him when he was obliged to name himself as Exr — when it is optional to sue as Exr or in his own Private Capacity he is liable for Costs — An Exr must sue as such when the Right of action has accrued to his Testator — as when the Personal Property of the testator has been injured or a breach of Contract had taken place —

An Exr may sue as such in his own private Capacity when the Right of action accrued to him from some injury to his testators Property in his Possession or from some breach of Contract made to him as Exr so is the law of Eng. but in Comon the Exr is in both Cases liable for Costs—

Of the Exr before Probate of the will

An Exr before the will is proved can do any thing but support an action & if he exercises any act of comon Stile over the testators Property he is as liable before as after Probate — If an Exr delays to prove a will in Eng the Ecclesiastical Court Cites him to appear before them — on his appearance there he can either Refuse or accept the office of Exr — If he Refuses the Court must appoint appoint an Administration Cum testamento annexo but if he does not appear agreable

to Citation he is pursued for a Contempt of Court by excommunication
In Connt if he does not appear on a Citation by the Court of Probate he is liable to a fine of $10. P month till he does appear — when more than one Extr is appointed by the testator on the Refusal of one & acceptance of the other - both must be Joind in the suit when Pff in the action — But the Extr who has accepted only is to be sued in Connt he only is to sue — The Refusing Extr may at any time before Performance of the trust for death of the excepting Extr / Come in and act as Extr with the other not with standing his Refusal - but after the accepting one dieth he can not. If an Extr die appointing an Extr the one by him appointed on his accepting the trust is of Course Extr of the first testator —

When the Executorship is held by a plurality of Exrs the survivor by the Jus accrescendi takes the Execu-torship - Thus for in Case of such Joint Executorship - on the death of one of the Joint Exrs leaving an Exr & then on the death of the Survi-vor intestate the Exrs of the first de-ceased Exr cannot be Exrs to the first testator - but there must be an ad-ministrator Cum testamento annexo appointed - The administrator of an Exr can in no Case be the Admin-istrator of his intestates testator - Nor is an Exr of an administrator in any Case to be the ad-ministrator of his intestator —

Of Judgt against an Exr —

A Judgt Record against an Exr for the debt of his testator joint goes against the goods & Chattels of the testator in the hands of the Exrs & not

against the body of the Exr on the Exrs
being Returned non est inventus a Scire
facias is forward on the former Judt
gt. agst. which the Exr. can make
no defence Except of matter subse-
quent to the former Judgt. - Sufficient
defence being made Exr. then goes aga-
inst him personally -
In actions for devastavit Judgt. lies
goes against the Exrs own goods - No
Creditor can when there is an ave-
age law Consistently therewith bring
an action against an Exr. for a dev
astavit - for that being the Case he
might notwithstanding an insu-
fficiency Recover his whole debt - but
for a devastavit the Creditor must
Come wh on his londsman -
But in Connt. there can be no greater
objection against the action by a lega-
tee than in Eng.d there it seems
that by such action a promising

legatee might Recover his whole legacy tho there was a deficiency of assets to pay all the Specific Legacies - 'tis not however customary for Legatees to bring suit actions in Court

Miscellaneous Articles

When money is voluntary Paid into an Ex^rs hands he is not liable for interest except in case of Mortgage money - but if he put it out to Interest he is then liable thereafter - & if the money be lost he having an ordinary prudence he is not liable for such loss & if Chan had Commanded him to put it out to Interest he must do it But if he Combd a Just & Creditable Debtor to pay in a debt. he is then liable for the debt & interest whether he put the money out to Interest or not - for him Combelling the payment of a Just debt Can be Recon=ciled

on no other Supposition that he meant to profit himself thereby & 2. Ves 83.

A difficulty arises in Case of a voluntary bond - when without that the Estate would be deemed insolvent therefore agreeably to the Rule that Creditors must be supposed to volunteer (for the obligee of such Bond is considered as a volunteer) the bond must be Rejected by the Commissioners on such Rejection. The Estate not only pays the debts but there is still a surplus of £50. The bond £100 now agreeably to the Rule that the Claimant shall be supposed to all volunteers. The obligee of the Bond ought to Come in & take the £50 in preference to any Legatee or next of Kin - But a Rejection of a debt by the Commissioners totally destroys it - so that the Creditor can have no Claim for the future* - Therefore it seems that the Ex^r in neither way

See Stat 27 - } But See the provisions of our Statute on this subject which says he shall have the privilege of his motion for a Subpoena &c -

can
proceed without transgressing some
one Principle of law - however the
difficulty may be evaded Judge Ru
-se thinks by the Commissioners in
such
Case taking an Amount of the Bond
& carrying it to the Court of Probate
to Stand as a Legacy of the first Rank
& being first entitled to Payment on
a Suit instituted —

It has already been mentioned. an
Ex^r in Eng. may Retain his debt in
preference to any other of an equal
Rank - & it has been questioned whe
-ther he must not Retain - the qu
estion however has been decided in
the negative. & he may let his debt
lie upon interest 2 Atk 409 -

If a Real Ex^r Plead no Ex^r he is
liable to the whole debt in his hands
2 Vern 157 -

Sir Thomas Clarkish Chan. have in one in
-stance at least Relieved against -

on the death of one of two Merchants
the moiety of the Company Property
vests in the survivor Exr — But tho
the Right of Property vests the right
of suing thereon or the negative ri
=ght of being sued for the Company's
debts does not but it survives to the
Surviving Partner — But tho the Exr
has no Right of litigation he has full
Power to Recover a voluntary Payment
& to Release a debt & on the Survivor
being Sued & proving a Bankrupt the
Exr becomes liable for the Co's debts. for
both Partners are liable for the debts of the
Company. but in such Case the Cre
itor mode of Redress in Eng. is by
filing a Bill in Chan. & suit has
been the mode in Connt tho the Su
=pr Court have now determined that
a Com. law action would be good —
If both the Partners should happen
to die eo instanti — tho the eminent

Lawyers are at a Stand. × Judge Reeve thinks the Exr must be sued on the presumption that his Testator was the survivor & that such a presumption ought not to be Rebutted or Contradicted

A Judgt being had by the Surviving Partner & Exr I said the question is whether on his death the Exr of the first deceased Partner can Compel the debtor to make Payment to him. or no other Person being appointed to Represent the last deceased Partner with power to do it —

A last will & Testament is "the legal declaration of a mans intention which he wills to be Performed after his death" —

× quere who can gather what Judge Reeves meaning is from what is here written? — for suppose if both die at the same time & both appoint Exrs which Exrs does he mean by saying the Exr must be sued

Lecture on Connecticut Practice

In the first case I shall treat of the Jurisdiction of our Courts of Law in Civil Cases — the Criminal & Equitable Jurisdiction will not be noted here but in our then Probate titles The Courts now to be Considered are 1st Single Magistrates. 2d Courts of Common Pleas & 3d Superior Courts.

I When of Single Magistrates — as Justices of Peace have Jurisdiction over all Civil Cases when the title of Land is not Concerned & when the matter in demand does not exceed $15. They have also original Jurisdiction of all actions on Note or Bond given for money only & vouched by two witnesses when the demand is not exceeding $35. But if the Note or Bond be vouched by one witness only or has no witness to it a Single Magistrate cannot take Cognizance of it if it exceed $15 — Kirby 202 —

But this Jurisdiction is not final for an appeal lies from the Judgt of a Single Magistrate to the Courts of Common Pleas when

the demand exceeds $7. except in Case of bond or Note given for money only & vouched by two witnesses

An arbitration Note given for more than $15 and not exceeding $35 is not Cogni=zable by a single Magistrate even if given for Money only & vouched by two witnes=es — for this is not a Note for money on=ly as the face of it Purports — but substan=tially given for the Performance of an award. 1 Root. 99. 126. 1 Swift 108.

If an arbitration Note is over $7. an Appeal will lie from the Judgt. of the Justice pursuing Judgt. thereon

It has frequently been a question when a Note or Bond was originally given for more than $35 for money only & vouched by two witnesses & Endorsed down to less than $35 whether a Justice of the Peace has Jurisdi=ction in a Suit on that Note

The Supr. Court in the Case of Paine v Paine determined that the face of the Note should give the Jurisdiction — that an endorsement

Cannot alter it for that may be a part of the dispute — nor can the Party waive a part of his debt in order to lepen it to the Juris diction of a Justice — But since this division they have determined the sum in demand and can shall determine the Jurisdiction {1 Swift 108. 2 Root 60. 377-8.

Mr. Gould supposes the first division to be the most Correct — If either of the witnesses to the Note or Bond become interested or die a Justice cannot take Cognizance if it exceeds $15. (see Kirby 387 / overruled)

{1 Root 223. 316 —

When the Title of land is concerned the Statute thus enacts. That when an action of Trespass is Brought before a single Magistrate for damages done on land & Record be made thereof & this ousts the Justice of his Jurisdiction — After the Plea made the Party making it shall become bound with one or more sureties by way of Recognizance to the adverse party in a sum not exceeding 67 dollars, "That he will

pursue his Plea & bring forward a Suit at the next County Court in that County." This seems to mean that the Deft should bring forward some Process or institute a new action in the County Court to try the title -
But the Practice is different. The Justice certifies the whole Proceedings or Record in his Court, which is sent up to the County Court to try the title & the defendant must adhere to his original Plea for he cannot alter either without or upon motion 1 Root 344
If after the Record is thus certified to the County Court the Deft neglects to Pursue his Plea - the Stat. says that his default shall be Recorded & that a Scire facias may issue from the County Court on his Recognizance
If he Pursue his Plea in the County Court & fails to prove a title Judgt is Recorded agst him for triple damages & Cost
But if after his Plea of title he should Refuse to enter into a Recognizance his Plea shall abate (ie) his Plea shall not be Regarded & Judgt shall be rendered as if he had

made on such Plea & enquiry shall be made into the facts as if the Qu. Ipsa had been Pleaded & on proof of the facts such Judgt of Court goes against the Deft.

1 Root 549.

We have a late Stat. enacting that if an action is Brought before a single Magistrate for obstructing the waters of a River &c. and the Deft. Pleads Specially that he had a Right to do it — an appeal lies from the Judgt of such Magistrate to the County Court & from thence to the Supr. Court — on every appeal from the Judgt of a single Magistrate a duty of 50 Cents must be paid and a Certificate thereof of by the Magistrate is to be made & if the Certificate thereof be not made it will abate

A single Magistrate may take & admit the Confession and acknowledgement of any debt not exceeding $70 exclusive of the Cost from the debtor to his Creditor either upon or without any antecedent process as the Parties shall agree which

Confession must be taken from the debtor in Person — An Atty. cannot confess in Court as in England — Of this confession the Magistrate must make a Record & may grant Execution — { 1 Swift 108

It has been determined that the Judgt. should specify the Particular debt or duty about which it is conversant as Bond, Note or Book that the Judgt. may be a Bar to an action for the same thing { Kirby 152 —

The Judgt. must not be for more costs than the Magistrates fees if there has been no attendant Proofs but if there has been the Cost of such Proofs may be contained in the Judgt. & all this must appear of Record { Kirby 238 —

But a Magistrate cannot take a confession on an arbitration Note for he is to take confession only of a Just & liquidated debt If the confession on arbitration Notes be allowed the Party can have no way in Court to object against the award let it be ever so irregularly made { Swift 109 Bro. B. L. 1791 Root 327

A single Magistrate may unan on Stat
administer the oath Prescribed by Law to poor
Debtors — If in an action befor a single
Magistrate a Recognizance is entered into by
or him for more than $15 a Scire facias
will not lie Returnable to the Magistra
te to enforce it — the only way is by action
of Debt befor the County Court — for Scire
facias is a Judicial writ Issuing Regul
arly from a Court in which a Judgt. has
been already Rendered for the Purpose of
carrying that Judgt into effect. It can
Issue only from that Court where the Judgt.
has been Rendered or the suit is Pending
In all Civil actions when the title of land
is in question or in all Civil where the
matter in demand exceeds $15 & Kirby 220

II. County Courts —

This Court has original and likewise final
Jurisdiction when the matter in demand
does not exceed $20,* except in action on
bond or Note given for money only and
vouched by two witnesses so when the title

* This doctrine is incorrect or Am I am so sticky that I can't
understand it

of land is in question, And in this case if such Bond or Note exceed $35 they have final Jurisdiction — by final Jurisdiction is meant that this Judgt is not appealable from but may be carried on writ of Error —
An Appeal lies from the County Court in all cases when the title of land is in question to the Supr Court or when the matter in demand exceeds $70 (dlo) except in actions on Note or Bond given for money only & vouched by two witnesses 1 Kirby 280 —
It is settled that an appeal is not determined by the sum demanded in the Declaration of the declaration except first when the damages are Presumptive as in the case of Torts & 2 when the action is founded on Contract and the sum of damages cannot be ascertained without extrinsic Evidence as if it appears ~~that~~ from the Record that according to the Rules of ascertaining damages Judgt cannot be Rendered for more than $70 there can be no appeal merely from what appears at the close of of the declaration —

If an appeal should be granted in either of these cases by the County Court - when it comes before the Sup. Court the appeal may be pleaded in abatement that the cause of action may be dismissed and in one case they ex officio dismissed it from their docket

{ Kirby 35. 1. Root 202. 127. 238 - 76. 518. 28 -

Thus (if an action) a Pltff in an action on Book should demand more than $70 dollars yet if it appears from his own books exhibited in open that $70 is not due the Defr. may make it a Part of the Record and prevent an Appeal. It is to be taken advantage of by the Defr. when the motion for an appeal is made by objecting to the appeal

{ 1 Root 518. Kir 278 -

Yet in an action on an arbitration Note for more than $70 If it appear from the Record that the matter in controversy, or the award is not exceeding $70 no appeal lies 1. Root. 127. 238 -

In an action on Note or bond given for money only & proved by two witnesses for more than $70 dollars if one of the witnesses die or become

interested an Appeal lies from this to the Supr. Court & 1 Root 227. 266. 316. 1 Swift 96 Contra & Kirby 387

We have a Stat. Providing that in an action on a Rule agt. an offier for not Executing an Execution no appeal lies from the Judgt. of the County Court whatever the sum may be - the same Rule extends to a Justices Court when Cognizable by him — There is one exception to the above Rule (viz) when an action is brought before a Single Magistrate for not serving an Execution granted on a Confession of more than 7 dollars an Appeal lies In those Cases the offier is to have 14 days Notice 1. Root 153

But if an offier gives a Rule for an attachment & is sued on the Rule - an Appeal lies as in all other Cases — so also if an action is Brought by an offier against a Rule-ptsman no appeal lies - but in this case if the Property is taken on Mesne Process an Appeal & Kirby 40 —

From the Judgt. Rendered by the County Court

on an award by Auditors in an action of
Amount on book debt no appeal lies -
If a Cause is not Appealable according to
the provisions of our Stat - no agreement of
the parties can make it appealable or in
other words nothing the Parties can do will
sustain it in the Supr Court or other Court
Appealed to - the agreement of the parties
cannot alter the Law - 2 Root 60. 377 -
No appeal lies from a Judgt by default un
less there was a hearing in damages & if there
was a hearing in damages & the Party appea
-ls he cannot have any hearing in the Cou
rt appealed to except as to the Amt of damag
-es, on a Judgt Rendered on Nihil dicit in
the County Ct an Appeal lies to the Supr Ct
& then the Deft may Plead as in ordinary Cas
es - for his Refusing to Plead does not admit
the Plffs Right of action as seems to be the case
of a default - {1 Root 566 -
It has been decided that no appeal lies from
the Court of Common Pleas to the Supr Ct in
a Qui Tam Prosecution - for a Crime by

forthwith proves, the reason why an appeal is not allowed is the Proceedings are Crimin=al in Point of form altogether — From the Court of a Single Mg^te in such case an appeal lies however small the damag=es, the appeal is here on the Part of the Deft & is never allowed on the Part of the Public { 1 Root 403, Kir 269. 1 Swift 96 —

No appeal lies to an adjourned Court in any case the words of the Stat. are "To the next Court" which has Reference to the next stated term and an adjourned Session which Properly but a continuation of the same Term

{ Kir 366 / Swift 96 —

The appeal must be taken in that term in which the Judg^t appealed from is Renderd. a Party is allowed to appeal at any time wi thin the term. but 'tis best to move for an appeal immediately after Verdict Joined or Judg^t Rendered —

Appeals to the Sup^r Court must be entered in in the docket before the 2^nd opening of the Court and not after unless the appellant shall

Pay to the appellee all cost to that time which shall not be refunded however the cause may finally [illegible] which cost being taxed & Paid the action may be entered befor the Jury and dismissed & not after, and if the appellant does not enter befor the Jury are dismissed the Appellee may enter at any time during the Term appealed to & have the Judgt of the Court by Court affirmed with the additional cost But the appellee is not obliged ~~in not~~ to do it for he may sue on the Bond

Appeal from one to another destroys the one appealed from unless the Court appealed to is deficient in Jurisdiction - The Judgt in the Court above when the appellant enters is a new substantive Judgt But if the appellee enters the Judgt is not a new one but an affirmance of the Judgt in the Court below The Judgt however in the Court below is suspended even when the Supr Court wants Jurisdiction 'till the Judgt is quashed in the Court above — A State duty of one dollar is Payable on all appeals from the Judgt

of the County Courts & unless there is a Certificate that the duty is Paid at the time of taking the Appeal such appeal will not lie This duty must be paid at the time of taking the appeal while the Court is open or the appeal will not be sustained —

{1 Root 472. 2 ca. 11.

Suppose the Record says the duty was paid can Evidence be admitted to show that it was not - Contradicting the Record?.

It is said & has been correctly that the Certificate was Conclusive —

It has been decided that an Ancillary Suit is appealable tho the Judgt. complained of was on a Note which was not appealable Either party may take an appeal except when the Judgt. is altogether in favor of the party wishing to Appeal - 1 Root 318. 2 ca. 27.

If the Plff Recovers less than his demand he may have an appeal & so may the Defdt. appeal if the Plff Recovers any thing — If an appeal is denied when it ought to be allowed a writ of Error lies

if it is allowed when it ought to be denied no writ of Error is necessary for it is the duty of the Supr. Court to quash it but if they refuse to quash it a writ of Error lies to the Supr. Court of Errors

If a cause is not appealable and a motion is made for an appeal it may be defeated in several ways 1st He may object in writing to the motion in the Court below 2. if the appeal is allowed he may Plead in abatement in the Court above 3d he may move in arrest of Judgt. 4th he may bring a writ of Error 5th it may be erased by the Court ex officio either with or without motion

III. Superior Courts.

This Court has no original Jurisdiction in Civil Causes Properly so Called. except where a writ is to be Brought against an officer for not Returning a writ Returnable to this Court & not Returning an Execution Issued by this Court - The Jurisdiction of this Court is not exclusive in these excepti ons for actions may be Brought in the

County Court & most universally are

{1 Swift 97. 2 Root 251–

This Court has authority to Issue writs of scire facias to enforce its own Judgt. this cannot be called an original writ for it is merely to enforce a Judgt already Rendered or to keep alive the Proceedings in Cause appealed from the County Courts – This Court has appellate Jurisdiction from the County Court in all Cases when an appeal will lie from that Court – It has appellate Jurisdiction of Causes decided by the City Courts An appeal lies to this Court from every Judgt, Sentence, decree, determination, denial or order of the Court of Probate This Court has Jurisdiction of all writs of Error Brought for the Reversal of Judgts Rendered by the County Courts or any Court before a Single Magistrate or any Erroneous decree in Equity

IV Supreme Court of Errors

This Court has Jurisdiction of writs of Error in all Actions final Brought for the Reversal of any Judgt. or decree of the Sub.r Court in matter of Law or Equity when the matter complained of is erroneous apparent on the face of the Record But it never takes Cognizance of matter of fact for it cannot incharge a Jury — This Court was instituted in 1784 previous to which time the General assembly was the last Resort, It formerly consisted of the Govr Lieut. Govr & 12 assistants as Counsellors, but by an act Passed in 1806 it consist of the Nine Judges of the Sub.r — and is holden alternately (by) at Hartford & New Haven in the month of June each year

Of the Proceedings by which our Civil Rights are enforced in our Courts of Justice An action or suit is defined to be "the lawful demand of one's Right" & it is by action or suit that all Civil Right is enforced. 3 B.C. 116 — The first stage of a Suit in Court is the writ

and declaration which according to our met
od I pass to gither

1st of the writ. The writ consists of all that
part which precedes the Pffs Claim or ground
of action of the Signature of the Magistrate
Certificate of the duty paid, Recognizance,
of the attention to the Office or indifferent
Person, The date is common to both the wr
it & declaration

Our Procs is of two Kinds (Viz) Summons and
Attachment. By Procs is meant the means
of Compelling the Defd to Appear in Court
or by giving him Opportunity to Appear if he
sees fit, in order to hold him to bail. The pr
ocess Contained in the writ is Called the or
=iginal or Mesne Procs to distinguish it fr
=om final Procs or Execution - in Eng. the
Procs is distinct from the original writ.
when the writ is a praecipe but when it is
a si te pecunit summon then it passes in
Court 3. Bl. C 274 Atkyns. 7. 13-
The writ in Connecticut must be signed by
a Magistrate or Clerk of the Court to which

it is Returnable it must describe the Court to which it is Returnable & the time & Place of Session 2 Day 423.

When the Precept is by Summons the direction to the Officer is "to Summon the Deft. to appear &c when by attachment the Officer is directed "to attach the goods or Estate of Deft. & for want thereof attach his body & him have to appear before the Court &c

The writ is ordinarily directed to the Sheriff of the County or his deputy or to either of the Constables of the Town where the Deft. lives The writ may be directed to the Sheriff only as to I. R. L. Sheriff &c - or to D. M. Constable &c But whether a Single direction to a Deputy Sheriff is good seems to be questionable -

When the direction is to the Sheriff generally or to the Sheriff by name, his given or Special Deputy may Execute the writ, in ordinary Cases the writ must be directed to some one or all of the Officers, But the Stat. provides that when a proper Officer cannot be had without great great Charge & inconvenience

It may be directed to A.B. an indifferent Person and the Name of such Person must be inserted by the Magistrate in his own hand writing and the Reason for such direction must be inserted in such direction Cow 403. Salk. 12 2 Root 72 Hob. 12. B. 95 - 6 Vin 204

It would seem from our Statt. & from a Rule laid down in 1 Roots Rep. 284 that the Reason should be inserted by the Magistrate himself as well as the name of the indifferent Person But the Practice is universally otherwise for the Reason is inserted by the draftsman and the name by the Magistrate, But it appears to me that the Statt. as much Requires the Reason to be in the handwriting of the Magistrate as much as that the name of the Indifferent Person should be — It has been decided that the indifferent Person need not make oath to the truth of the Return but a Special Deputy Sheriff must make oath to his Return. 1 Root 284—

It is not Settled what Person may be an indifferent Person for this Purpose

But the circumstance that he is a bonesman in the writ is no disqualification — It has been decided by the Supr. Court that a Sheriff's Deputy or Constable may be a Bonesman in the writ which he serves Root 328

The Certificate of the Magistrate as to the necessity of the direction to an indifferent Person is conclusive and cannot be questioned

1 Root 284. Kirby 6 —

It has been decided (that) by the Supr. Court that a direction to a Sheriff or an incuffirent Person is ill, But it has been holden that a direction to a Sheriff & indifferent Person is good — 1 Root 285

If the Return of a writ directed to an indiff=erent Person be altered from one term or time to another the writ will abate because the Necessity which exists for such direction at one time may not exist at another 2 Root 369

But such alteration when the writ is directed to a public officer will not abate it

A writ against a Town may be directed to an inhabitant of the Town as an indi=fferent

Person — So on the same principle I suppose a writ in favor of the Town may be directed in in the same manner 2. Swift — 188.

It has been a question whether a writ could be directed to a Minor as an indifferent Person But in the Case of Tyler v. Tyler it was determined that a minor was not such a Person was capable of having writs directed to him to serve & Return as an indifferent Person

{2 Root 519.

[This Law of serving writs by indifferent Person has lately been Regulated by the Legislature and now no Person can do this unless the Creditor appear before the Magistrate & make oath that he is in danger of loosing his debt] — Stat. Con.

A Justice of the Peace can grant original Civil Process only throughout the County in which he dwells for he is a County Officer & so Stiled in all Legal Processings (Viz) Justice of the Peace for the County of &c, by a New Statute he may grant writs into the adjoining Counties Returnable into his own

A Justice may grant final Process or Process

of Execution throughout the State - He may likewise Issue Criminal Procs throughout the State to bring a delinquent to be tried before himself So he may Issue a Summons throughout the State to bring witnesses to testify in such Cause Kirby, 182-

It has been decided by the Supr. Court that a Justice may Sign a writ in favor of the Town in which he lives

Clerks of the Supr. & County Courts are authorized to sign writs Returnable to their Respective Courts but to no other 1 Swift 100

Formerly when there was but one Clk. of the Supr. Court he had authority to Issue mesne Procs into any Part of the State Returnable to his own Court - but since there has been one Clerk established in each County it is a question whether they can Issue mesne Procs out of their Respective Counties

The Clks of the Supr. & County Court may Clear by Issue original Procs throughout their Respective Counties Returnable to the Courts to which they belong

The Clerks of the Supr. Court may Issue original Criminal Prosps throughout the State Returnable to their own Court, but it must be done during Term time & under the seal of the Court - It was formerly the case that the Judges of the County Courts & Justices of the quorum could not Issue original Civil Prosps out of their Respective Counties, since by a late Stat. they are enabled to Issue throughout the State when Returnable to their own Court - But by a late Statute they are authorized to Issue all Prosps throughout the State as fully as Justices in their own Counties

The Govr. Lieut. Govr. & Judges of the Supr. Court & Assistants are authorized to Issue Civil Prosps throughout the State whether mesne or final

The writ by our Practice must contain the names of the Parties, the Town & County where they belong, this in ordinary Cases is the only necessary addition, But when an Office or Civil Character of any of the Parties is an Inducement to the action that must

be inserted As if the Exr. be sued or sues he must be described as A.B. Exr. of the last will & testament of C.D. —

On all writs in Civil Cases there must be paid at the time of Issuing them a duty. This duty must be paid to the Magistrate. If the writ is Returnable before a single Magistrate the duty is 17 Cents*, If to the County Court 34 Cts If to the Supr. Court 1 dollar, If to the Supr. Court of Errors 2 dollars & a duty of 2 dollars is also payable on all petitions of an adversary Nature brought before the Legislature —

The same rates of duty are Required on Petitions in Chancy. — The Stat Requires that the payment of the duty be inserted in words of full length on the writ in the hand writing of the Magistrate himself. It seems now to be settled that if such a Certificate be not on the writ the writ is not only abateable but wholly void & the Court may ex officio erase it from the docket — 1 Root 505 —

If there is no Certificate of the duty's being paid the writ is not amendable. & the Supr. have

* This duty is off by a repeal of this Court of the Statute done in 1817 —

decided that a Magistrate cannot amend his Certificate of the duty — 1 Root 505

The Stat. Provides that a writ once filled up against one Person cannot afterwards be filled up against another without a new duty being paid & a Certificate thereof in the writ & if such a writ is Brought without a new Certificate, the Court will ex officio cram it from the docket.

The Stat Requires a duty on qui tam prosecutions for they are suits of the County and under his control & for his benefit altho the Public are not Joined in the suit. 2 Root 526

No duties are Required in Public Prosecutions

Bonds for Prosecution

It is necessary to the validity of a writ in certain cases that a Bond for prosecution should be entered this is always Required in attachments — The Stat providing that in every writ of attachment the Plaintiff shall give sufficient security to prosecute his action to effect & to answer all damages in case he fail to make good his Plea — The Land is taken by the

Magistrate to the adverse Party. Then bonds for Prosecution are not in the nature of Bail Bonds as seems to have been supposed —

1 Root 563. 2 Day 423. Kir 378.

The Security is taken by way of Recognizance acknowledged before the Magistrate who signs the writ at the time of Issuing it The Justice's Certificate on the writ of such Recognizance being taken is not the Recognizance it self but merely a memorandum of it — 1 Root 563 —

It has long been a question whether the Recognizance is given as a security for the Property attached or whether it shall cover the Cost only — Most of the Profession hold that it is to secure the Cost only. If the Bond is given for Cost only it is absolutely requisite that the Off. bond for he is liable to the Costs bond or no bond — but it has been decided by the Sup. Court in Fairfield County August Term 1798, that the Off. own Bond was sufficient when he was of sufficient ability to pay at the time of taking it,

I understood the decision was on the ground of
of usage affirmed in the Court of Errors -
{2 Root 322 - 1 Day 227. 1. Root 166 -
If it appears to the Court before whom the
writ is Returnable that the Off's own Bond
is insufficient the Court on Motion may
order a new bond and if such bond is not
Procured or given when ordered the Court
will dismiss the Suit
It has lately been decided by the Sup. Court in
New London County, that if a Magistrate
signs a Blank writ and takes a Recognizance
of the Blank & the is after wards filled up
that the writ will abate. for the Stat Requires
that the bonds be taken to the adverse party
in the Suit which cannot be done when
none is in the writ. According to the
practice a bond must be taken on all
qui tam Prosecutions on forth with prous
for the Courts Consider them as attachments
But when a qui tam Civil Action is
Brought by Procs of Summons, a Bond
for Prosecution is not Required —

A Bond for Prosecution must be given by a substantial inhabitant of this State when a writ Issues in favor of some Person not an inhabitant of this State. the necessity of which is apparent (Viz) to secure the Costs the Plaintiff belonging out of the State In all Cases when Bonds for Prosecution are Required the writ will abate if such bond be not entered — Our Stat. also Requires that a bond for Prosecution should be given by some substantial Inhabitant of this State when it appears evident that the Pltff is unable to Respond the Cost which the Defts may Recover agst him — This application by the Pltff. who are inhabitants of this State But in this last Case the writ (I conceive) cannot be abated for want of the Bond, for the Signature of the Magistrate is Conclusive Evidence that the fact of the Pltff inability to pay Costs did not appear. 2. the Stat only Provides for Cases when the Pltffs inability appears to the Magistrate — But if the Defts. prove to the Court that the Pltff is unable to pay Costs, on Motion the

Court will order a Bond to be entered and if the Plff refuse to Procure such Bond he will be Non-suited. It is sufficient to support this motion to the Court, that the Plff is unable at the time of the Motion. Such a Motion must be made within a reasonable time if Possible. for the Deft should not move at so late a Period as to give the Plff no time to Procure Bonds. It has been ruled by the Supr Court on Motion for such a bond after the Cause had been Called on for Trial & the Jury Impannelled that it was too late — Kirby, 344 —

— If the Magistrate also who takes the bond is guilty of any misconduct in doing it by which the Deft suffers damages, he will be liable to him in an action on the Case — The Rule is this if the bond at the time of taking is apparently sufficient, altho it afterwards becomes insufficient, the Magistrate is not liable for he has done his duty But if the Bond is apparently insufficient at the time of taking the Magistrate will be liable — This Rule in both its branches holds

as well when the Plff's own Bond is taken as that when the bond of a third Person's bond is taken — The Law as to writs of Replevin is different from writs of Attachment. tho the last Gen^l Rule applies to both —

Replevin Bonds —

When the Plff own bond is taken on a writ of Replevin the Magistrate is at all events liable if the Plff in Replevin is not eventually able to Respond the Reason is the Plff's own bond cannot be apparently sufficient for if the Plff's own bond on a writ of Replevin were deemed sufficient, all the benefit intended by the Law in allowing Attachments would be totally defeated for the Property is attached by the Plff as additional security which he would not obtain if his adversary's bond might be taken on a writ of Replevin 6 Root 165-8-261-56-

Bonds for Error and Appeal —

On every writ of Error a bond for Prosecution must be given with surety — In none of the cases above mentioned does the Stat. Require Security — — So every Party appealing from

the Judgt from Court to another must give bon
-ds with sufficient security. here again the Offs
ocon bond is not sufficient. the Appellant &
Bondsman are bound that the Appellant
shall Prosecute his Appeal to effect. by this
is not meant that unless the Appellant
shall Prevail in the Court above that
the bond shall be forfeit - but that he
Prosecute - but if he does not enter his Appe
al in the Court above the bond is forfeit
And if the Appellant fails to enter the
Appeal the Appellee has two Remedies
one by entering the Appeal himself and
taking Judgt - in doing this the measure
of damages is the Judgt obtained in the Co
urt below & the Cost - or he may omit
entering & Resort to his action against the
Appellant
By the Appellant entering the action in the
Court above the Bondsman is Released from
the Judgt but not from the Cost. - In or
-der to subject the Bondsman the Appelle must
take out Execution & have it Return'd Non est inv
-entus

as to the Appellants Personal Property - The usual action Brot on the bond is by a writ of Scire facias - The Action of Debt will lie -

The Rule laid down as to bonesman being on Appeals is applicable to bonesman on Attachments - & notwithstanding that the Appellant has sufficient Real Property the Bonesman is liable

The entering of Special Bail does not exonerate the bonesman on an Appeal or original Prosp. both are liable for the costs - if sufficient Personal Property is not owned by the Principle — Bonds for Prosecution are not within the Stat of Limitation, with Respect to Bail / as to bail the Statute is that actions are Barred in one year from the time final Judgt is Rendered { 1. Root 563 -

Where a Writ is Returnable

According to our Statute in all Transitory actions to be tried by the Sup: or County Court. the writ is to be Returned into that County when the Pff or Deft dwells - This is different from the Com. Law Rule for there the writ

must be brought and the writ Returnable
that County where the cause of action aris
=es — But the Com. Law is evaded by fiction
in transitory actions & in Certain Cases the
Court will Challenge the Venue.
In Cont. where the Title of Land is in questi
=on the writ must be made Returnable in
that County where the Land lies, without
any Reference to the County where the Plff
or Deft dwells —
In all actions of Trespass quare Clausum fre
git it has become the Practice to bring them
in the County where the Trespass was com
=itted. Altho they are in their nature Personal
actions —
It has been decided in [Comm. Law] this County that a qui
=tam Action for an offence is a transitory action, and may be brought in the County
where the Plff dwells — & so I presume in the
County where the Deft dwells — Altho the Offen
=ce was committed in an other County —
When the offence is Prosecuted by the Public the
Prosecution must be Brought in the County
where the offence was committed { Kel 40 —

Tho it is a gen.l Rule that all actions of a transitory nature must be brought in the County where the Plff or Deft dwells Yet a writ of Error to the Supr. Court must be brought in that County where the Judgt complained of was Rendered - 1 Root 259 -

The time When Returnable -

our Stat. enacts that all writs Returnable to the County Courts must be Returned to the Clks of said Court on the day next Preceding the sitting of such Court & not afterwards the construction given by our Courts to this is they may be Returned on or before the day preceding the Setting of the Court

Later Returns may be made by the Consent of the Parties for it is a maxim that a Person may be permitted to Renounce a Rule of Law made for his benefit - Under Certain circumstances the Courts have permitted later Returns to be made without the Consent of the Parties - as when the officer died & said the writ was sick - - All writs Returnable to the Supr. Courts must be Returned

to the Clk. thereof before the 2nd opening of the Court {1 Root 563 –

writs Returnable to the Supr. or County Courts must be made to the term next following the date of the writ if there is sufficient intervening time to give legal notice If it is made Returnable to any other term than the next where the time is sufficient to be made returnable to the next term. it may be abated or if Judgt is Reversed it will be Erroneous or it may be erased by order of the Court from the docket ex officio – for says Mr Gould the writ is void a mere nullity {3 Wils 341. 1 Root 315 –

Of Proces & Service –

Proces in Eng. (as before observed) is the means of compelling the Deft. to appear in Court – but in Connt. it is merely the means of holding and may be without his appearing in Court – our Proces is of two kinds 1. Summons. 2 Attachment when the Proces is by Summons service is made by reading the same in the hearing

of the Deft or by leaving an attested Copy at his usual Place of abode - But it may be done by Putting a Copy in the hands of the Deft -- & 2 Swift 188 - 1 Root 497

It is said that an Offr is obliged to furnish the Deft with a Copy when the Proces is by Summons but our Stat makes no Provision in Case of a Summons -

When there are two Defts in the State a Copy must be left with each of them - but if Husband & Wife are both Defts one Copy will be sufficient & 1 Root 475

The Copy as before remarked must be attested (ie) the Offr must endorse on the back of it that the within is a true Copy of the original - & if the attested Copy or not attested Copy is not a true one the writ will abate

If the writ is served by reading & after wards as by Copy if the Copy is not a true one still the shall not abate —

It is frequently practiced for the Defts Attorney where the Deft lives out of the State to

to acknowledge Service of the writ — But it has been determined that an acknowledge=ment of Service without Special Author=ity for that Purpose will not conclude the Defr — Mr Gould thinks that Judge informed him that the Supr Court at N. London had determined that the Defr was not concluded — Incurring to immem=orial usage all Petitions & writs of Error must be Served by Copy & in one case it has been decided that writs of Error mu st be served by Copy —
on Petitions for New trials & writs of Error if the Defr lives out of the State a Copy must be left with his Attorney in the St=ate 2 Swift 189 —
It is said by Swift that if a Person not an Inhabitant of this State happens to be hun a Service on him by Summons will be sufficient to hold him to trial 2 Sw. 189 —

Attachments —

when the Proof is by attachment Service is Regularly made upon the Property or the body

of the Deft. It is a settled point that service by reading or Copy is sufficient to hold the Deft to trial altho neither Person or Estate are attached { 1 Root 128. 563 - 2 Co 130. 340 -

The Offr has no right to take the Deft's Body if he can find Personal Estate sufficient to answer the demand, he knowing it to be the Property of the Deft (at Com. Law the case is otherwise) If an Offr finds property to only half the demand he is not obliged to take it & without direction from the Plff he is not Justified in taking it - But M Gould apprehends that an Offr ought never to be liable to either Party for omitting to take Personal Property if he has any doubts to whom it belongs. for an Offr is never Required to run any Personal Risque - M Gould apprehends that the Offr ought not to be liable to the Deft for taking his body when he did not find Property it being impossible to the Offr - The Offr cannot hold both body & Property of the Deft at the same time. & he is not to take the body if

he can find personal Estate - If the Offr has actually taken the body of the Defr he notwithstanding is bound to take Personal Estate if it can be found in him Power or if it is after wards retaken & on Request By the Defr he is bound to take him to the Place where the Property is & if he Refuses he will be liable to the Defr { 2 Swift 170 -

The Defr Land is also liable to be taken on attachment but the Offr is not bound to take the land if he can find Estate or the body - nor is he Justified in taking land when he can take Personal Property unless he has Particular direction from the Plff so to do. But if he cannot find either body or Personal Estate he must take land

Our Stat. Provides that if Property Real or Personal is attached. the Offr must leave with the Defr or at the usual Place of his abode (if within this State) a true & attested Copy of the writ & of his Return describing the Estate by him attached thereon - & when any Real Estate is taken

the Offices Serving the writ must leave a true & attested Copy of the writ & a discription of the Estate attached at the Town Clerks in the town where the Land lies & until the Service is so Compleated the Estate that is att ached shall not be held by such attachment agt. any other Creditor or bona fide purchaser unless such Copy is left in Service within seven days next after attaching the Estate & before the time limited by Law for the Servi =ce of such writ is expired -- { Kirby 103-

But the omision of the Copy directed to be left with the Town Clerk will not abate the writ - the object of leaving such Copy is to merely give notice to the world of the lien that is on the Land - Personal Estate that is attached is not holden to Answer the Judgt. agt. the Debtor or any other Person unless Exon be taken out & levied upon it wi =thin 60 days after final Judt. is Rendered But there is an exception to this Rule when the Property attached is under a Prior incu =brance - as Pledged for debt. Now the attac =hing

Creditor shall lose his lien upon it If Exn is not taken out & levied within 60 days after such incumbrance is removed —

The Rule is the same when Invisible property is attached but in all cases when the Deft is out of the State at the time of the commencement of the action & does not Return before the first day of the term the Court must continue the action to the next succeeding Stated term (but cannot to an adjourned term for this is no more than a continuation of the same term) If the Deft does not appear by himself or attorney at the 2d term & he be so remote that notice of such Pending suit could not Probably have been conveyed to him during vacancy the Court may further continue the cause to a 3d term & if he do not then appear Judgt will go agst him by default — {1 Root 387 —

If the Deft is in the State at the time of Service his going out after Service & before the term of the Court does not authorise a Continuance & so if the Deft is not an Inhabitant

but is here at the time of Service. his going out after will not authorise a Continuance or if the Defr came into the State after service but before Court it will not be Continued so if the Defr in any case is willing to dispense with the Continuance the is no need of one

In all these Cases where Judgt is Renderd against an absent debtor the Statt Requires that Exr be staged 'til the Plff lodge with the Clk a bond with one or more sufficient sureties in double the value of the sum or estate recovered by such Judgt Conditioned to Refund or restitution to the Defr such sum as shall be given in debt or damages or so much as shall be recovered on a suit thereafter to be brought within 12 Months after Judgt. If upon such suit the Judgt shall be Reversed annulled or altered - the security afs is to be no further liable than for the Recovery that shall be had upon such suit to be brought within 12 Months as afs

And if Exrs Ignes without such Bond lodged with the Clk. the Judgt is Erroneous of which

the Deft / but non else / can take advantage, such Exr and all proceedings under it therefore are good as to all other Persons besides the Debtor.

Our Statute also Provides that Real Estate taken on Exr Issued against an absent debtor shall not be sold or paid away untill after the Expiration of 12 months after Judgt or after a new trial had on a suit brought within 12 Mo for the obtaining of Restitution of such estate / 1 Swift 335-2 do 267- 1 Root 167-

It was formerly the case in this State that if a writ of foreign attachment was brought before a Single Magistrate Judgt might be Rendered immediately - But by a late Statute if a writ of foreign Attachment is Brought before a Single Magistrate such Magistrate in case the Debtor be not in this State and no Attorney Factor agent or trustee appear to defend in the suit shall adjourn the same for a term not less than 3 months no more than 9 - / but suppose an Attorney Factor or agent does appear in the suit - then I conclude that Judgt must be Rendered Immediately /

If a Judgt is Rendered by a single Magistrate against an absent debtor the Scire facias agt the garnishee is issued & signed by the Magistrate who Rendered the original Judgt unless he is removed by death or otherwise & then any other Proper Magistrate may issue

When the demand in the Scire facias does not exceed $15 dollars it must be Returned before the Magistrate who Rendered the original Judgt unless he be Removed by death or otherwise & then before any other Proper Magistrate — But if the demand Exceed $15 it must be made Returnable before the County Court in the County where the Offr or dept resides

Miscellaneous Rules —

In an action on Joint securities or Contracts when all the Defendants are not inhabitants of this State Service of the Process on such as are inhabitants of this State shall be sufficient Notice to hold them all to bail & if any such Deft are arrested on whom the Process was not served he may be Relieved by Audita querela

If one of the Defts. through out of the State at the time the suit is commenced is an Inhabitant of this State. Servis must be made on him by leaving a Copy at his last usual Place of abode here & the Suit of Course must be continued as hereto fore mentioned

If the Court do not Continue it on term at least & Interlocutory is Rendered it will be erroneous — This point was decided in Middlesex County by the Supr. Court about 7 Years ago — If the Deft in a suit is insane the Case of a Conservator such Conservator must be Cited to appear & Defend. but the omitting to do it does not abate the suit for the Court will grant Reasonable time to cite him in — (this will extend to overseers both when they are appointed by the Court & when by the Selectmen)

A Deputy Sheriff cannot serve as a Coroner for or upon the Sheriff — as he acts under the Authority of the Sheriff his acts are the acts of the Sheriff & it would be absurd that the Sheriff should serve Process on himself

But a Sheriff may Serve Procss for or upon his Deputy — This last point was decided in the Case of James — vs Free-Holds at Sept. Term 1803 but the Court were not unanimous the Chief Justice one other dissenting — One Deputy Sheriff may serve Process for or upon another Deputy Sheriff for they are one Servants to the Sheriff —

When Town, Societies Trustees for Schools Proprietors of Comt. undivided Lands, grants & other Estates & Interests & all other Lawful Societies or Communities are to be sued. Service is to be made in the Case of a Town by leaving a Copy with the Select men or Town Clk. in Case of Societies, Trustees for Schools Proprietors & with their Town Clk. or Committee man —

of the Time at which Service must be made

our State provides that no Person shall be Required to answer in any Civil Case or action unless the writ if Returnable to the Sup. or County Court has been served at least 12 days inclusive before the first day of Court &c

or if Returnable before an Assistant or Justice
6 days inclusive as aforesaid
In suits against towns Proprietors of unsaid
ided lands, Societies & other Lawful Commun
ities, tho the writ is Returnable before a
Single Magistrate yet 12 days notice is
Required —
A suit by foreign attachment must be
served by leaving a Copy with the Garnish
-ee at least 14 days before the sitting of the
Court whether before the Supr. County or Si
ngle Magistrate — —
So in suits against Officers for not exec
uting writs or for not Returning them or
for making false Return Service must
be made on them 14 days before the Sitting
of the Court In all these Cases the day on
which the writ is served is included in
the Computation & the day on which the
Court sits is excluded & if Service is made
on the last day allowed for making Servic
it must be accomplished before the even
ing twilight & while there is natural light

enough left for the Offin to Read the writ if
not served before the writ will abate - *
It has been decided by the Supr. Court that
qui tam Prosecutions Brought for the Recove
ry of Penalties are not within the foregoing
Rules as to notice - The Rule as to qui tam
Prosecution is that they may be Commence
d by forthwith Procss - 1 Root 436 -
If a qui tam prosecution is Commenced in
the form of a Civil action. The same notice
as in a Civil action will be Required -
on a Citation to a Conservator to appear in
a Cause the usual notice is not Required by
the Statute as in other Cases, all that is Requi
red is Reasonable notice & as to what is reaso
nable notice the Court are to determine -

Of Bail -

Bail in Court is of 2 Kinds. 1st Bail to the Sheriff
or other Offices 2nd Special Bail or bail above -
our division of bail does not at all Corresp
ond with the English -
1st Then of bail to the Office - When the body is
arrested under an attachment in the nature of

(* this doctrine was overruled by the Supr. Court 1810)

of the Offices to keep him safely that he may have him forth coming at the Return of the writ unless he give sufficient Bail for his appearance — the Commaun of writ being to attach the goods or Estate of the Defr & for want thereof take his body & him have to appear before the Court. If no Bail is offered or insufficient bail is offered it is the duty of the Offices to keep him safely & for this Purpose he must be committed to Goal for safe Custody { 3 Bac. 290. Tidas Prac 170.

In Connt a Defr cannot be committed to Goal on Mesne Procss without a mittimus this mittimus is a Precept directed to the Goaler by the Magistrate who signed declaring therein the cause of the Defrs arrest & Commitment & Commanding the Goaler to Receive & keep him safely untill Released by due order of Law —

By the English Statute of 23d Hen. 6. & by our Stat. of our own the Office is bound to accept sufficient Bail when offered & to discharge the Defr At Com. Law the Office might

arrest but was not obliged to do it —
to Bail or admit Bail to a Deft who has
been arrested is to deliver him over to his sure
-ties on their giving security to have him
forth coming at the Return of the writ
& 3 Blac 290. Ties Chan. 106.
The Offr right to arrest the Deft on mesne
Procss is founded on his ultimate Right to
arrest him on Exr —
The Security which is given is called Bail
Bond — according to our Stat the Bail must
consist of one or more substantial in
-habitants of this State who are of Suffi
-cient Responsibility to satisfy the Judgt
that may be Rendered against the Deft
The Bail Bond is conditioned for the appe
arance of the Person so arrested before the
Court at which such writ is made Re
-turnable — a form of which may be seen
in Goodrich's Civil Offices —
This Bond being given the Defts is imm
ediately discharged from the arrest & if
the Offr after arrest Refuses to admit suff
-icient

Bail & detain the body he is liable to the Deft
in a action of false imprisonment -
If no Bail or insufficient Bail be offered
the Deft is to be committed to Prison. If he
is committed to Prison for the want of suff
-icient Bail - he cannot be detained there
in more than 5 days after the rising of the
Court Removing Judgt - Therefore if the
Pltff would detain him longer he must take
out Exn and levy it on the Deft before the
expiration of the 5 days if he does not
do this within such time the goaler is bound
to discharge him on Removing his own fees
as Jailor
But the Offr may Release the Deft without
Bail & if the Deft appear in Court at the Return
of the writ or Summons himself or by the
Exn the Offr is saved But this Proceeding is
altogether at the Risque of the Offr
3 D. 6 290 Kirby 209 -
But the Offr himself can never become the
Deft Bail - for the Bail bond is to be taken
by him as Sheriff & otherwise 'tis void -

and he is Required to assign the Bail Bond to the Creditor to exonerate himself - It is therefore absurd & opposed to every Legal Idea that the Sheriff should be liable in that Capacity { Ibid } —

In Comm^t if the Offr takes insufficient Bail he is liable to the Plff on a Non est inventus Returned on the Execution in an action of Escape - In Eng^d the Rule is otherwise for if the Bail is insufficient in the first Place a Rule is made on the Sheriff to Return the writ (if not already done) if he does not a 2^nd Rule is made to bring in the body —

{ Tidd Prac 167. 1. Bac. 206. 4 Ann 461. 3. B & P 291.

It has been decided in Comm^t that the Offr is not liable if he takes Bail apparently sufficient at the time of taking altho it after become insufficient — But this is no answer to either Rule in Eng^d for the Offr runs the risque

The Bail may at { 1 Root 54 —

any time on suspicion of the principal's intending to escape take him into

and surrender him to the offices, it has been supposed by some that the Bail may Retake his Principal on sunday - But it has been denied in Eng[d] that he Cannot for it is not analogous to an involuntary escape

[2 Bl. Rep. 1173. 5 Tr. 25-

The Bail have no Authority to Command assistance in taking their Principal, for they are in their nature more Keepers of their Principal But they may obtain assistance if they Can & the Persons so assisting are not liable in Trespass —

The Bail Bond is negotiable to the Plff in the action only both in Eng[d] & in Connt in the forme it is made so by Stat. 4 & 5 Ann[e] 1 — [3 Bl. 290 - 1. Root 281 Tied. Pr 156. 1 Bac. 207-

So that after the Bond is assigned an action may be Brought in the name of the Plff but according to our Practice it may be brought in the Offices name after the assignment & universally is - The point that the Plff may maintain an action in his own name on the bond was denied in the Case

115

Van Lyp v. Trall Litchfield County Court 1798–

If the Plff accepts the apignment of the Bail Bond he ipso facto discharges the offices – the Plff therefore ought to be extremely cautious in excepting it

Tidd, Prac. 176 Salk. 99 – 1 Wils 223–

In Cont. if the Bail are sufficient the Plff is bound to accept an apignment of the bond in discharge of the office & according to the decision in Roots Rep the Plff is bound to accept the apignment of bond if the Bail were apparently sufficient at the time of entering into the bond 1 Root 54–

If then the Plff having refused to accept an apignment of the bond and sues the office for an escape It is a good Plea for the office that he took Bonds apparently sufficient at the time of taking & is ready to apign the same – Mr Gould doubts the propriety of an offices Pleading an offer to apign the Bail bond he supposes that from our Stat it is the Plffs duty to demand the Bail bond & that it is sufficient for the office to stand in readiness whenever the demand is made

If the Offin having Rugnd Inquest on the Bail Bond dies
& Scire facias by his Exr or Admr is not bro
and by the Defts Paying the Cuã the Debt & cost
but he shall Recover what the Offin has
Paid & his fees 1 Root 274——
It is a Rule in Eng. the Defr cannot be twice
held to bail for the same cause of action
But this Rule is not admitted in Conr 2 Tu 756-
Tho the Condition of the Bail bond is that if the
Defr appear &c— the bond shall be void, still
his own appearance does not work a forfei
ture of the Bond. Tho in the terms of it the bond
is broken for by our Stat - the Bail does
not become liable the Offr obtains Inquest &
Exr & has a Return of non est inventus thr
con 1 Sid 74 or 172. Vin 209. 382. 434—
If then the Defr is not surrendered in Court
it is the Offrs duty if he would subject the
Bail to take out Exr and on all demanding
same to take the body of the Defr, if the Defr
is Returned before a Return of non est in
ventus (is Returned) it exonerates the Bail-
But if the Principal makes avoidance and

cannot be taken on Exn by the use of due diligence. then on a Return of Non est in ventus being made the Bail becomes liable to the whole amount of the Judgt Recovered agst the Principal & 2 Swift 174—

The proper action to be brought on the bond agst the Bail is the action of debt—but from the words of our Statute it seems that a Scire facias would lie & Judges Swift & Elsworth seem to be of the same opinion. In the above cited Cases the question was raised. but the Court gave no opinion thereon they being other points decided on which the Cases turned off — Mr. C. considers it an unsettled principle at this time & 2 Sw. 172. & Kir 385—

An actual surrender of the Principal on the Exn is not necessary to save the Bail for the Officer is bound to use due diligence to take his body & is not warranted to make Return of Non est inventus till he has made use of due diligence

& Kirby 385. 2 Swift 174—

It has been determined in a Case where the

Principal shut himself up in an inner room & so prevented the Offr from taking him that the Offr was Justified in Returning non est inventus

{ Ridy 385 – 2 Swift 175 –

Tho it is a Rule that an avoidance by the Principal & on Return of Non est inventus the bail will be liable – Yet if the Return is not fairly made the Bail will not be subjected – for in order to render the Bail liable the Return must be fairly made & without Collusion

But it is necessary for the Offr in order to subject the Bail that he delay returning until the 60 days – The Law requires nothing more than that he give reasonable time for the surrender of the Principal and as to what is reasonable time must be determined by the Court according to the Particular Circumstances of the Case –

{ 6 Mod 383 –

Bail to the Sheriff may be discharged 1st by actual surrender into Court of the books of the Dept

2nd by Surrender of the body of the Defr on Exn
before the Return of Non est inventus or by be-
ing when he may be taken by the Sheriff
3d by the Defr procuring Special Bail. 4th
by the Pff accepting of the Defr a Plea
without putting in Special Bail & of the
Defr in Court without Pleading he does not
discharge the Bail (but) & without the
more in Custody of the Court. but a mere
appearance of the Defr in Court without
Pleading does not discharge the bail
& Kirby 434—

Mr. G. supposes that a dilatory Plea will am-
ount to such an appearance as will discha-
rge the Bail — If the Defr is surrendered
in Court it is necessary that it should
be made a matter of Record. for no other
than Record evidence will be admitted
to prove a surrender & Bir 18. 2 Swift 174
Tho Ray 50 - 1 Robt. 210—

And for the Pff's security he ought to move
the Court that the Defr be ordered into the Cus-
tody of the Sheriff— & Kirby 434—

When a deft whose body has been attached
appears in Court & does not enter Special
Bail, he must Plead (if the Pff Require it)
in the Custody of the Court these words "in
Custody of the Court" amount to a volunta
ry surrender of himself into the Custody
& as before Remarked if the Pff accepts a
Plea not containing these words the body
of the Deft is discharged
Mr Q submits that when there has been an
actual Previous surrender of the body of the
Deft into Court the words in Custody of the
Court are not necessary —
The ground on which the body is discharged
is because the acceptance of the Plea not
containing the words "in Custody of the Court,"
is a waiver of the right to action the Defts body
But if the Deft having Plead in Custody of
the Court prevails in the original action
he is not bound on a new trial being grant
ed to Plead in Custody — Nor of course on
the 2d trial to be obliged to enter special
Bail This case was decided in the case of

of Butler vs E— about 1799— when E. in the original action Pleaded in Custody of the Court &c— If no special Bail is given & the Plff enters a Rule from the Deft not containing the words in Custody &c— & the Deft Prevails in the County Court on an ap=peal to the Supr Ct. the Plff cannot Require him to Plead in Custody &c— for having once omitted a Rule without those words he was on his Right of afterwards requiring it. the Rule would seem to be the same if the Plff had Prevailed in the County Court for the grounds of not submitting it in the Su=pr Court is not because the Deft has prevailed but because the Plff has waived the right of af=ter requiring it— The Rule (I apprehend) must obtain when a new trial is granted whichever Party Prevails — 2 Root 101—

The first Stage of the Proceedings after the Return of the writ — Appearance in Court is the first act of the Deft — In Court he appears Regularly by himself or Attorney at Com. Law he could not appear by Atty.

yet must appear — & Salk. 8. Tidd 122.
in Person & it is by the provision of the Stat
of Westm. 2nd 13th Ed. I. that Parties are allow
ed in Eng. to appear by attorney. — In Cont
we have no Stat allowing the Parties to app
ear by attorney. but the English Stat of
Westminster 2nd has been adopted here
& 2 Mod. 83. Co Litt 128. 1 Mod 244.
But tho Regularly at Com. Law the Parties
could not appear by Attys. yet Corporatio
ns aggregate must always so appear for
a Corporation has no Physical existance
(or as Coke says) neither soul nor body.
& Co Litt 66. 8.
Our Supr Court have decided that an attorney
cannot appear for a Town when such Town
is Deft unless such Atty is Retained by a vote
of the Town or unless Retained by agents Spe
cially appointed by vote of the Town to ma
-nage the suit. Select men as such can
not retain Counsel for the Town (i.e.) the Atty
so Retained Cant appr for the Town. An Infant Deft must
always appear by Guardian or next friend. but an Infant
Plff can appear only by Guardian.

II As to Special Bail

When a deft who has been arrested is brought into Court by the Offr or is surrendered by his own voluntary act or his Bail he may be admitted to Special Bail the entering of which ipso facto discharges Bail – what we call Special Bail is called in England Bail above or Bail to the action – {3d Bl. 290 –

If the Deft whose body is not surrendered nor enters Special Bail – Judgt must go by default – When Special Bail is offered which the Plaintiff deems insufficient – he should except to it which if he does the Court will Judge as to its sufficiency – In Comon Special Bail is taken only in open Court by way of Recognizance with sureties that the Judgt of the Court shall be satisfied by them if not comply the other – {3 Bl. 291

This Recognizance is made Payable to the adverse Party. Tho formerly they were made Payable to the County treasury

It has been decided that a Party for whose benefit a Recognizance has been taken may sue & Recover Judgt thereon whether he were the Recognizee or not - & Kirby 378 -

If the Recognizance is forfeited the Special Bail are obliged to satisfy the whole that may be Recovered including debt & Cost

But the Recognizance is forfeited in no other way than by the Principals avoidance and a Return of Non est inventus on the Exn - In England Special Bail are discharged if the defdt is surrendered at any time before the Return of the Scire facias against the Bail & 2 Hen. Bl 593. 1 Wils 270 - 10 Ben. 216. 1 Hen Bl 74

It is a Rule of the Court that no Attorney of the Court in the Office where the writ is Returnable can be Special Bail. but the object of the is said to be to prevent maintainance - this Rule however is an arbitrary Rule of Court

& Doug 450 - 6. 466. Note - 1 Hen Blac 96 -

Special Bail have for the purpose of taking their Principal a Right of going into his House to take him as much as he has to

go into his own House himself — Mr. Gould supposes that the Bail have the same right to enter in order to take the Principal that the Sheriff has after an Escape - 2. Hen. B. 120

It has been denied in Eng. that a Bail may enter the House of a Stranger the out or door being open for the purpose of taking his Principal & break the inner door if found necessary, but Mr G. supposes they may likewise break the outer door for this may be done on original Arrest & a fortiori on an arrest by the Bail there is not however much to be found on the subject - {2 Henry Blac 120 -

It has been a question often Stated whether a Special Bail taken upon a Court in one State can take the Principal by virtue of the Bail Piece in another State - It has once been denied by our Sup. Court in the affirma-tive, This was in the Case of Mosp & Malcom the question is now pending upon the Sup. Court in Virginia for the form of a Bail piece Now {3 Blac Abrm No 3 -

If final Judgt is Rendd against the Defts
the Rule is that an exoneretur by the Prin-
-cipal the Bail is liable to the whole am
ount of Judgt & Cost. The usual and most
Proper action to be brought agst the Bail is
by Scire facias - for the action is Brought
to enforce a Judgt which is matter of Re
cd. And on the Scire facias the original
Judgt against the Principal is affirmed agst
the Bail with additional Cost - This Scire
facias that goes against the Bail Calls on
him to appear & show Cause why such
Judgt should not be affirmed 2 Swift 173
& Kirby 178.

Under our Stat. the writ of Scire facias or oth
-er Proces on the Bond must be ~~sued~~ brou
ght agst the Bail & served within 12 Mo
-nths after final Judgt So also actions ag
ainst the Sheriff must be brought with
in the same time & 1 Root. 380. 2 Swift 174 —
It has been decided in the Construction of
this Clause of the Stat that the 12 months
above mentioned are Calendar Months

and not Lunar – this is Contrary to the Gen-
-eral Rule of the Com. Law – unless the Lex
Mercatoria Calendar Months are used
1 Root 380 – 2 Blac. 141 – 6 Tu 224. Chitty 143 –

According to our Practice no entry is ma-
de on the Record of the Particular day wh-
en Judgt is rendered – all Judgts being en-
tered up as of the first day of the Term –
& 2. Root 380 –

It has been decided that the particular
day on which Judgt was Rendered may
be proved otherwise than the Record. In an
instance the Court have allowed the Clk to
certify that Judgt was Rendered on such a
certain particular day – and in another
instance they allowed in evidence the com-
putation of Interest on a security to that
day on which Judgt was rendered –

If Special Bail is given in the County
Court & then an Appeal is taken to the Supr
Ct. it is sufficient for the Plff Purpose th-
-at the Scire facias be sued on the Bail
within 12 Months after final Judgt in

the Supr Court. & 2 Swift 175-
for in such Case the Judgt in the County
Court is not a final within the mean
ing of the Statute - for the appeal for the
Appeal destroys the Judgt of the County Court
it follows from the limiting Clause of the
Stat - that Exn must be taken out against
the Principal and a Return of Nonest
inventus made within 12 Months after
final Judgt & 2 Swift. 175 -
It is settled that Suits on bonds, Recogn
izans for Prosecution are not within
this limiting Clause of the Stat (ie) such
Suits need not be Brought within 12 months
& 1. Root 304. 3 -
A Recognizance entered for Prosecution of
an Appeal will not exonerate Spiritual
Bail in this Case both ~~are liable~~ the Recog
nizors & the Bail being liable. This is a
desirable security. Spiritual & Bail to the
Sheriff may on Judgt being Returned against
them maintain an action against
the Principal before the Exn is satisfied

But if a bond of indemnity has been given to the Bail they may maintain an action thereon against the principal upon avoidance made by him

If final Judgt is given in favor of the Deft the Special Bail are of Course discharged & if there is no such Bail that to the Sheriff is in like manner discharged

An Erroneous Judgt tho reversed on a writ of Error has the effect of final Judgt upon the Stat - 1 Root 182. 367 - 2 Swift 175 - 6 -

So also a Judgt in favor of the Deft tho afterwards set aside on a new trial being granted is final within the rule & therefore such Judgt discharges the Bail & the same Rule (I conceive) extends to Bonds generally - 1 Root 469. 2 Swift 176 -

A final Judgt entered for the Deft discharges the Bail 1 Root 469 -

And every Judgt in Chief in the Suit in favor of the Deft is a final Judgt. So every Judgt in Chief given in favor of the Deft

by the County Ct or Single Magistrate & not appealed from is a final Judgt

If Judgt is rendered agst the Defr the Spiral Bail may be discharged by Exn being issued thereon & his body surrendered upon it or taken upon a Return of Non est inventus or by being in such a situation that he might be taken or by the death of the Principal before Return made. & 2. Swift 173. 5

Spiral Bail may on motion be Changed if they have failed, or for any other sufficient Cause - the Rule holds as to Recognizors for prosecution & 1 Root 175-6-

Of the defence -

The Defr having appeared & when required any having given Spiral Bail or been taken into Custody he must in the next Place make his defence

& 3 B.C. 292-5-7 In C.

By defence is meant a denial of the Pffs Cause of Action 3. B. C. 296 —

Judgt is not Regularly Rendered untill after defaults is made - Yet in Certain Cases Judgt may be Rendered without any default made - 1st Judgt may be Rendered as well before as after default made by default - by our practice if the Defts does not appear at the Return of the writ after being Publickly Called 3 times in Court his default is Recorded in the County Ct. - The docket is Called on the first day of the Term and if the Defts does not appear before the 2d day of the Term & move to have a trial (in which Case he must pay down to the adverse party his Cost to that time*) by having the default Recorded from the docket the Judgt shall be Rendered then & on the 2d day Exon may be granted -

In the Supr Court the docket is not usually Called on the first day - Regularly the Judgt is not entered by default till the Case come to its time of Trial unless the Plff move that the Case be Called

* It is a rule of the bar that the Defs shall have all of the 2d day to rectify the docket without paying down the cost by entering defaults

But by a Rule of both Courts the Pff may at any time take a Judgt by default unless the Attorney for the Deft will make upon his honor in Open Court that in his belief a serious defence. this is to avoid delays or procrastination of Justice - after default the Deft is not in Court for the Purpose of moving for (the purpose of) an appeal, unless he has had a hearing in damages - on a Judgt by default or on demurrer the damages are assessed by the Court & not by the Jury. this is called a hearing in damages

But in Eng in such Case the damages are assessed by a writ of enquiry by the Jury, of late however in Eng. a Jury have been dispensed with & damages have been assessed by the Court especially in actions on Bills of Exchange - 1 Tr 395-410 -

It is difficult to learn how the Courts in Connt came by this authority to assess damages for the Pl at Clearly does not authorize it - on default suffered

when the damages are presumptive and no hearing in damages is moved for by the dft Judgt goes against him for the whole sum demanded for when the Judgt so goes against him by default & he does not move for a hearing in damages he admits the sum demanded to be due. If a motion to be heard in damages is made he admits nothing more than that the Plff has cause of action against to some amount or other but not to the amount demanded. 6 Tr. 302.

But when the damages are ascertained as on an obligation for money then being no motion for a hearing in damages the default admits no more than appears from the face of the writing & its endorsements to be due & not to the amount demanded in the declaration

The default amounts to the same admission when the damages are ascertainable by reference to some known Standard as in an action on a Note for

articles - then Court enquire as to the valu
e of the Articles (without any motion or
=der) of any Person present whom they Plea
=se - But in both these last Cases (Viz) when
given for money or for Collateral artic
-les & default suffered & a motion made
to be heard in damages - the dft may
prove payments not endorsed on the
Note & which are disputed 3 Tr 202-3-

In the last Case as in presumptive dam
ages if a Motion was made for a hear
-ing in damages after default - It admits
no more than that the Plff has a true
Cause of action - In Eng. when an action
is brought on an obligation for money
a default suffered admits the same
as in Convt -

2nd Another mode in which Judgt may
be entered as well before as after defence
is by Non suit - If the Plff after the
Return of the writ neglects to appear
or is guilty of any defaults or delays
in not abiding by the Rule of the Law

or of the Court he is non suit by permitting himself to be publickly called 3 times & not answering & this must be done before the verdict of the Jury is delivered to the Clerk- provided the Ct. amend the verdict- If the first Verdict should not be amended the Plff may suffer a non suit before a second verdict is delivered to the Clk- & 1 Root 471- Kirby 273-
If the Ct do not amend the 2nd Verdict but return the Jury to a 3d- Conclusion the Plff may suffer a non suit before such 3 Verdict is delivered to the Clk & 1 Root 471-

When the Plff suffers a Non suit the Deft on motion may have Judgt agst him for Cost & this motion must be made at the same time at which a Non suit is suffered & Kirby 269

In Eng as well as in some of the United States it is common for the Judge to order the Plff to be non suit when the declaration does not disclose a cause of action or the evidence does not

-ort one - But the Plff is not obliged to a-
-bmit to this oraw of the Judge. Tho there is
hardly an instanw when it has been re-
isted, as it would be fruitless for the Plff
to insist in proceeding with the will of
the Judge in opposition to him

But after a Nonsuit suffered ~~on~~ a order
or oraw of Court the Plff is in Court
for the Purpose of moving to set it aside
as being contrary to Law - after a Non
suit the Plff may always sue again for
the same Cause

3d another Instance when Judgt may be
Rendered as well before as after defense is
by Retraxit - A Retraxit is an open
& voluntary Renunciation of the suit
by the Plff in Court. In Connt after a
Retraxit the Plff may sue again for the
same Cause - but in Eng. he Can not -
{ 3 Bl. 396 —

The Plff may withdraw a suit in Cont.
in every Case when he may suffer a
Non suit — { 1 Root 552. 71 - Kirby 293 -

After a Retraxit the Deft must move for Judgt for his Cost at the same time the Retraxit is or he waves his Right

Ruby 269. 70-

There are two Modes in which it becomes necessary to renew any Judgt at law 1st if after the Cause is Publickly Called on the first day of the term - the Parties ought to appear - the Court may "no appearance" and the Cause is thus out of Court & cannot afterwards be revived unless the Parties both come into Ct - & consent thereto

Bibby 361

If the Parties once having appeared fail afterwards of appearing a discontinuance is entered — 1 Root 439 —

The defence is made on the Part of the Deft by Pleading the Defence is really the introduction to the Plea — In our practice we frequently omit the word "Defend" As to the different modes of defence see Pleas & Pleadings -- As to the time of making defence in the County Court —

Statute enacts "that all Pleas in abatement in said Court shall be made, heard & determined & an issue in such joind. & an entry thereof made before the Jury are impannelled this has been found impracticable & of Course has been disregarded & the Rule now practised upon is that all Pleas in abatement shall be made & issued before the rising of the Court in the afternoon of the 2nd day — In the Sup. Court all original Pleas of abatement must be made & tendered to the Pltf. or lodged with the Clk before the opening of the Court in the afternoon of the 2nd day — 1 Root 464 —

Pleas in abatement & writs of Error are not within the Stat of Limitations It has been a long standing Rule in the Sup. Court that Pleas to the action must be made by the opening of the Ct on the morning of the 3d day where the time is but one week & by the opening of the Ct on the 4th when the time is longer

this Rule has not been strictly Regarded
& Kirby, 289 - 1 Root 164
But since the new organization of the
Sup. Ct a Rule is made in each Com
for Pleading in vacation in such Cases
as are Continued over to the next Court -
In Certain Cases the Deft may under
our Law Change his Plea - the Statute
does that whenever any party shall sup
pose he has mistd his Plea (whether
the Gen. Issue or Special Plea) which wo
uld have saved him in his Justification
he shall have liberty to alter his Plea on
paying Cost to that time & the opposite
Party shall have Reasonable time assigned
to make answer thereto - - Our Courts
exercise a discretionary Power in allowing
this alteration & 1 Root 425 -
Tho it is a general Rule after the Deft
may alter after he has Pleaded to Issue
yet after having Pleaded to Issue & Judgt
thereon Rendered he cannot then
-or to the declaration & Kirby

But it is a gent Rule that the Deft on an appeal may change his Plea in the Court above to from what it was in the Court below without having the Court & without paying Cost this Rule is not found out on any Stat. Whenever the Deft Changes his Plea he must use these words as "Changing his Plea &c"

The deft cannot go back in the order of Pleading when an appeal has been taken. [C. G.] he cannot Plead a dilatory Plea after having Plead to the action So he cannot when a Plea of title change his Plea in an action of Trespass The Rule is that Pleas must be changed within the same time that original to the action must be made but this Rule has not been strictly observed. & since the new organization of the Supm Court has entirely been dispensed with [illegible] tho the Deft has universally a right to change his Plea yet there is no necessity

of doing it or of making the same Plea again, for he may Rely on the Plea which he Pleaded in the Court below

As to the alteration of a Plea in the Court when it was originally made even after the trial by Jury has Commenced see 1 Root 71-437. 404-2 Root 406-

An alteration made in the County Ct as to a Plea in abatement may be altered in the Supr Court 1 Root 301-425-

Our County Court have decided that a Plea in abatement cannot be amended - It has been decided that the Deft may alter his Plea after the Cause has been argued once demurred & the Cause delivered back to the Court for Issue

Of Issue & Trial -

The Issue being closed the Cause is then prepared for trial. Regularly matters of Law are to be tried by the Court & matters of fact by Jury This distinction however can not hold as to Courts held by a single magistrate for they have no Jury

quetions of Law are very often involved in
Issues of fact & it is difficult to disentan
gle them & more so in Court. Whereas
give every thing in evidence under the
General Issue - Issues of fact may by
consent of the Parties be closed to the
Court & be tried & by them & their agre
ment thereto must appear in the Rec
Issues in Law are always closed to the
Court & tried by them - the parties can
not by agreement put themselves to the
Jury on a demurrer -
After a trial has begun to the Jury it
must Proceed unless the suit is with
is withdrawn or a Nonsuit suffered
or unless the Parties agree to Postpone or
stop it
our Courts in directing the Jury do not
direct them how to find nor do they
give them any opinions on any quition
of Law or fact which have arisen
in the case - & Kirby 179 -
they are dispatisfied with the

verdict they may in Civil/but not in Criminal/ Cases return them to a Second & a third Consideration but no further in Returning them for a further Consideration they then give their Reasons for disjunting from the Jury & Stran 1183–

Our Stat provides that when the parties have made their Pleas, given in their issues & the Cause is committed to the Jury, there shall be no after Pleas, arguments, evidences heard or Received in the Case Lifon the Jury have returned their verdict into Court & the same is Recorded —— The Party who is to prove the affirmative of the Issue in fact goes forward & likewise does the argument/1 Root 471–

But in Issues in Law the Counsel for the party who takes the exception opens & closes the argument —

It is a Rule on Motions & interlocutory questions that only one Counsel can be heard on a side without their leave of the Court nor on

the action unless the amount exceeds $34
or the title of Land is in question. This
Rule is disregarded except as to taxation
of Cost - Then they allow fees to no more
Attorneys than are allowed by the Rule
above - - - Amendments will Relate
no Consideration him being heard off
in our Rules & Pleadings

If a Deft is arbitrarily made a Deft
to prevent him from testifying in a
Cause - There are two modes in which
the object may be defeated at the trial
1st If no evidence at all is exhibited
against him that is so Joined. The Court
will on motion exhinge his name and
allow him to testify 6 D.N.P. 281- 6 H.D. 420-
2nd If there is some slight evidence had
and against him & such as in the opin
ion of the Court will not be suffici
ent to convict him he may on motion
be tried first & if acquitted by the Jury
he used as a witness -

The Verdict

The verdict is the finding of the Jury on the Issue closed to them. Regularly every Issue should be found affirmatively or negatively in the terms of the Issue closed

{3. B.C. 277. 1 Root 571 or 2 –

And it is not sufficient for them to say that they find the Issue for the Plff or Deft nor that they find all the material facts to be true. Yet if the Jury find in terms the substance of the Issue the verdict is good

{1 B. Rep. 78 –

The Court may after a verdict Rend it final when the substance of the Issue is found It is not allowed for the Constable or officer who attends the Jury to be present in the Room with the Jury while they are deliberating upon the Cause under their Consideration nor to have any Communication with them or they with him relative to the merits of the Cause. But still it is not a practice to arrest the verdict for such Cause {2 Root 311 per curiam

{Say. 26 Note

If the Jury give more damages than are demanded — the Plff may remit the excess by entering a Remittitur on the Record & take Judgt for the Rest — 4 Dan. 21; 6 E. Dig 304 — 420 —

As to the rate of allowing Interest by way of damages, Vide Lit Money, as to suing damages se tit Assault & Battery

Of Cost

At Com. Law no Cost were allowed to either party. But if the Plff did not prevail he was amerced pro falso Clamore. If he did Prevail then the Deft was in misericordia for his unjust detention of the Plffs Right 2 Inst 288. 5. Dan 511 —

But now Costs are allowed in Eng by virtue of several Statutes — the first of which is the Stat of Gloucester — 6 Edward I —

Costs are regularly allowed in Comm. in civil actions except in four Cases

I^st^ Costs are not taxed for the Plff in Error for his suit in Error — tho he may Recover in damages the costs which he ought to have [illegible] in the Courts below and Judgt

been Rendered in his favor. 2nd when Judgt is arrested for the insufficiency of the declaration 1 Root 572. Kirby. 218—

3d If the Deft in an action of Book debt fails to exhibit his account on trial to be off-set against the Plff. & after wards brings an action against the Plff to Recover what might have been off set at the trial. he shall Recover no costs unless he show to the Court that he had no knowledge of the former suit or that he was inevitably hindered from exhibiting his account on that trial

4th on an appeal from a Court of Probate to the Supr Court if the Judgt is disaffirmed for a mistake of the Judge of Probate no Costs are allowed to the appellant, if mistake of the Judge was occasioned by the fraud or negligence of the appellee Costs are allowed 1 Root 187——

We have a Clause in our Statute providing that in actions of Assault & Battery, Trespass & Trespass on the Case brought before

the Sup^r or County Courts, if the Plff recovers
less than $7. damages he shall recover no more
Costs than damages. Except 1^st when the
Title of Land is the principle matter in
question he shall recover his full Costs
however small the damages may be -
2^nd when the Deft has appealed the cause
from a Single Magistrate to the County
Court or from the County Court to the Sup^r
& the Plff recovers full Costs - It is not
necessary that there be a Plea of title to
entitle the Plff to full Costs. 1 Root 88-160-
{2 Swift 268-

This Stat has never been construed to extend
to actions arising ex Contractu - { Ibid -

In trover if the effect of the writ is to
recover the thing demanded the Plff sh
all have full Costs, altho the Jury find
Special damages under $7 - 1 Root 136 -

We have a Stat. providing that when a
Deft appeals from a Judg^t of a Plea of
abatement & shall not make good his
Plea in the Judg^t of the Court appealed to -

Costs shall be awarded against him however the Case may finally Issue-

On final Incept in favor of the Pltff after abatement & amendment the Pltff shall Recover no Costs antecedent to the amendment excepting the writ, entry & Affirm fee - It has been held by the Supr Court that an appeal from the Probate by a minor if the decree of the Probate is affirmed - Costs shall be taxed against him Query ought it not to have been taxed against his Guardian who Controls him? - Then it might be allowed or not in his account against the minor - as it should appear to the Court of Probate Recoverable or not

If on motion in arrest of Incept a Repleader is awarded full Costs are taxed on final Incept in favor of the Prevailing Party 6 Root 373 -

If in an action against two on several Plea to the Jury one obtains a verdict & the Pltff recovers against the other the one acquitted shall Recover his

Costs - his witnesses. half the Fees paid to the Court & Jury & one Attorneys fee only

& Root 486 -

If two defts are Joined in an action ~~when~~ where according to the Rules of Law they cannot be Joined & are acquitted the Court will allow to each his full Costs & Ibid 470 -

If two or more defts are Joind when the Joinder is broke - tho both prevail but one Bill of Costs is taxed - So if two or more Plffs Recover only one Bill of Costs is taxed & travel & attendance is taxed as for one only -

The ordinary Items of Costs are the Price of the writ & entry. Officers fees for serving Plff Travel & Mile his attendance & any witnesses Travel & attendance. price of Depositions if any - Court & Jury fees & Attys fee - no Attorneys fee is allowed before a Single Magistrate and the reason is said to be because they are not Officers of such Courts - but it is the practice for Attorneys to sign Pleas as Attorneys in Single

Justices Courts, but 'tis improper & ought not be done. Copies in case of Appeal may be an item of Cost —

on a Petition for a New trial, If the Respondent is Cited to appear at the time when the Petition itself is Returned, tho the Petition itself is addressed to another term the Respondent is entitled to his Costs. 2 Root 31

In a qui tam Prosecution if the Deft is acquitted he is entitled to his Costs the same as in a Civil action 1 Kirby 182 - 236 -

On a Judgt of Confession before a single Magistrate. The Magistrate cannot take any more Costs than his own fee for taking the Confession unless it is taken on an antecedent Proceeding which must appear upon the Record (Ibid

Costs are Regularly taxed in Open Ct by the Justice Judge - tho it is said in Kirby 251 that it may be taxed out of Court

On a Judgt Remand on a Plea of abatement Costs are taxed in the County only up to the 2nd day of the Term after

Judgt is Reversed on a latter day

The Attorney for the Prevailing Party has a lien on the Costs Recovered by his Client If the money come to his hands he may retain to the Amount of his Bill he may stay it in transitu if he can lay hold of it { 2 H Blac 440- Doug. 226-

If he applies to the Court they will not grant it; being paid over till his debt is satisfied — If the Attorney had given notice to the other party not to pay it over till his Bill was satisfied a Paymt by him after such Notice will be a payment of his own wrong { 4 Term 123. Esp. 584- 6 Term 176 } Like paying a debt that has been assigned after Notice - or if such Costs are in the hands of an Officer the Atty may give him Notice not to pay it over to his Client but to him & if after such Notice he pays it over to the Party the Atty may have an Action against him This is Com. to both Eng. & Connt - but this Lien is subject to any Equitable

Claims of the adverse Party by way of set off {6 Tu 456 - 1 Hen Blac 24. 128. 214. 647 -

The Party who amends his writ or his Pleadings is Regularly to Pay Costs at the discretion of the Court - The Sup: Ct adhere very Strictly to this Rule - But the County Court in the County of Litchfield do not —